No. 893

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

~~No. 563 Misc.~~

CARYL CHESSMAN,
Petitioner,

vs.

HARLEY O. TEETS, Warden, California State Prison, San Quentin, California,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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NOTE

The Transcript of Record from the District Court will be referred to as R. ....., Vol. I.

The Reporter's Transcript of the pre-trial proceedings (pre-trial record) will be referred to as PTR. ....., Vol. II or III.

The Reporter's Transcript of the hearings (hearing record) will be referred to as HR. ....., IV, V, VI, VII, VIII, IX, X or XI.

The Reporter's and Clerk's Transcripts on appeal to the California Supreme Court will be referred to as Rep. Tr. ..... and Cl. Tr. ____.

The original exhibits before the District Court will be referred to as Pet. Ex. ..... and Resp. Ex. .....

Unless otherwise indicated, emphasis has been added by Petitioner.

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The petition of Caryl Chessman (hereinafter called Petitioner) respectfully shows:

The United States District Court for the Northern District of California, Southern Division, discharged a writ of habeas corpus previously granted and remanded Petitioner to the custody of Respondent for execution. (R. 204-215, Vol. I.) Brought here for review is the bare two-to-one judgment, decision and opinion of the United States

Court of Appeals for the Ninth Circuit affirming the District Court's action. (R. 264-281, 286, Vol. I.)

REFERENCE TO REPORTED OPINIONS.

[Rule 23-1(a).]

Chessman v. Teets (1956), ... F.2d ..... This is the opinion of the United States Court of Appeals, written by Judge Frederick G. Hamley and concurred in by Judge Dal M. Lemmon, here questioned. A copy of this opinion, the dissenting opinion of Chief Judge William Denman, as well as Judge Denman's dissenting opinion from the denial of rehearing, Judge Lemmon's memorandum opinion and the answering memorandum opinion of Judge Denman, are set out in the Appendix.

Chessman v. Teets (1956), 138 F.Supp. 761. This is the opinion of the United States District Court discharging the writ of habeas corpus previously granted and remanding Petitioner to the custody of Respondent for execution. It will be found at R. 204-215, Vol. I.

Earlier reported opinions, dealing with various aspects of the litigation, are:

People v. Chessman (1950), 35 Cal.2d 455 [218 P.2d 769, 19 A.L.R.2d 1084].

People v. Chessman (1951), 38 Cal.2d 166 [238 P.2d 1001].

Chessman v. California (1953), 205 F.2d 128.

In re Chessman (1954), 43 Cal.2d 296 [273 P.2d 263].

People v. Superior Court & In re Chessman (1954), 273 P.2d 936.

In re Chessman (1954), 43 Cal.2d 391 [274 P.2d 645].

In re Chessman (1954), 43 Cal.2d 408 [274 P.2d 655].

In re Chessman (1955), 128 F.Supp. 600.

In re Chessman & People v. Superior Court (1955), 44 Cal. 2d 1 [279 P.2d 24].

Application of Chessman (1955), 219 F.2d 162.

Chessman v. Teets (1955), 221 F.2d 276.

See also the companion case of an alleged and convicted confederate:

People v. Knowles (1950), 35 Cal.2d 175 [sub nom *People v. Chessman,* 217 P.2d 1]. This is the opinion and decision of the California Supreme Court construing § 209 of the California Penal Code under which Petitioner is sentenced twice to death and twice to life imprisonment. Here the state Supreme Court divided four to three, the bare majority holding that robbery *was* kidnaping and punishable as such. The 1951 Regular Session of the California Legislature repudiated this construction by amending the section and granting relief to everyone convicted under the section as it had read before amendment and who had been sentenced to life imprisonment without possibility of parole (Stats. 1951, ch. 1749, p. 4167). Yet Petitioner's conviction was allowed to stand (*People v. Chessman,* supra, 38 Cal.2d 166), although he then apparently was placed in the unique position of being twice sentenced to death for acts (regardless of by whom committed) no longer triable and punishable at all under the kidnaping statute.

The case has been before this Court on six previous occasions on certiorari:

1. *Chessman v. California et al.* (1950), No. 98 Misc., Oct. Term, 1950, certiorari denied October 9, 1950, 340 U.S. 840.

2. *Chessman v. California* (1951), No. 442 Misc., Oct. Term, 1950, certiorari denied May 14, 1951, 341 U.S. 929. A motion for leave to file an original petition for writ of habeas corpus was also denied.

3. *Chessman v. California* (1952), No. 371 Misc., Oct. Term, 1951, certiorari denied March 31, 1952, 343 U.S. 915; rehearing denied April 28, 1952, 343 U.S. 937.

4. *Chessman v. California* (1953), No. 239 Misc., Oct. Term, 1953, certiorari denied December 14, 1953, 346 U.S. 916; rehearing denied February 1, 1954, 347 U.S. 908.

5. *Chessman v. Teets* (1954), No. 285, Oct. Term, 1954, certiorari denied October 25, 1954, without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court, 348 U.S. 864.

6. *Chessman v. Teets* (1955), No. 196, Oct. Term, 1955, certiorari granted, Court of Appeals for Ninth Circuit reversed, and cause remanded to the District Court for a hearing, 350 U.S. 3.

JURISDICTIONAL STATEMENT.

[Rule 23-1(b).]

Petitioner seeks and asks this Court to grant a writ of certiorari under 28 U.S.C. § 1254(1).

This petition for the writ is timely. It is being filed well within the ninety-day jurisdictional period required

by 28 U.S.C. § 2101(c), which would have expired February 18, 1957.

The Court of Appeals decided the case October 18, 1956 (R. 286, Vol. I), and denied a timely filed petition for rehearing November 20, 1956. (R. 287, Vol. I.)

Precedent jurisdiction was established as follows:

Jurisdiction of the District Court to entertain the petition was based upon the allegations of deprivation of constitutional rights under the Fourteenth Amendment by the Courts, agencies and agents of the State of California (28 U.S.C. §§ 2241, 2242, 2243), the exhaustion of Petitioner's remedies in the state Courts (28 U.S.C. § 2254), including application for and denial by this Court of a petition for writ of certiorari to the Supreme Court of California "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court" (*Chessman v. Teets,* 348 U.S. 864), and this Court's subsequent holding, in granting certiorari, reversing the Court of Appeals and remanding the case to the District Court for a hearing, that Petitioner's charges, if sustained, set forth a denial of Due Process (*Chessman v. Teets,* 350 U.S. 3).

Jurisdiction was conferred on the Court of Appeals to review the order and judgment of the District Court (discharging the writ of habeas corpus previously granted and remanding Petitioner to custody: *Chessman v. Teets,* 138 F.Supp. 761) when that Court's Chief Judge granted a certificate of probable cause to appeal (28 U.S.C. § 2253; R. 252-254, Vol. I) and on the same date when Petitioner filed his second notice of appeal. (R. 255, Vol. I.) The

appeal was prosecuted under the provisions of 28 U.S.C. §§ 1291, 1294(1), 2253, and Rule 73, F.R.C.P.

QUESTIONS PRESENTED FOR REVIEW.

[Rule 23-1(c).]

1. By the participation therein of Judge Dal M. Lemmon, was Petitioner deprived of an impartial determination of his appeal to the Court of Appeals, the decision and opinion of which are here brought for review? Specifically, does the memorandum opinion filed by Judge Lemmon a week after the denial of rehearing reveal such an extreme absence of judicial fairness, impartiality, restraint and objectivity on the part of Judge Lemmon that the appellate proceedings are shown to be prejudicially tainted and hence are a nullity?

2. Since Petitioner was not permitted to establish inadequacies and omissions in the disputed Reporter's Transcript in order to show convictions obtained in violation of fundamental constitutional rights, was not permitted to be present or represented by counsel at the proceedings to "settle" the transcript (or at any time), and was not permitted to produce witnesses, examine witnesses called or test the challenged ability of the substitute reporter to transcribe the dead reporter's shorthand notes, did the Courts of California deny to Petitioner due process and equal protection of the law in ordering prepared and causing to be prepared (not by any known law or rule but by "human ingenuity," under the unsupervised direction of the prosecutor by his uncle-in-law), and then settling and accepting for use on the *mandatory* appeal, such

a uniquely prepared Reporter's Transcript of the trial proceedings, used as a basis for affirming the death and other judgments, without giving Petitioner any opportunity to defend against that transcript?

3. Is the Court of Appeals in error in holding that Petitioner had no constitutional right to be personally present at the Los Angeles Superior Court trial to create and settle the record of what happened at the trial on the merits, although this Court specifically has held, as shown by Chief Judge William Denman in his dissenting opinions, that the due process guaranteed by the Fourteenth Amendment applied to that trial and was in force at all stages of the proceedings? That is, did the Superior Court's admitted refusal to produce Petitioner and permit him to participate in the trial to perfect the uniquely produced record deny him due process?

4. Was Petitioner prejudicially denied the full and fair hearing contemplated by this Court in its Per Curiam opinion and impliedly ordered by this Court in its mandate, and resultantly was Petitioner kept from conclusively proving his charges of fraud?

5. Did the District Court commit reversible error in ruling that, on jurisdictional grounds, it could not and would not declare Petitioner's rights under 28 U.S.C. §§ 2201 and 2202?

May a state, through one of its agencies, by administrative fiat, arbitrarily seize and deprive a citizen of his property? Similarly, may a state forcibly deny to any citizen the right to speak freely and to publish his sentiments on any subject, when that citizen remains responsible for the abuse of the constitutional privilege? May a

prisoner convicted in a state Court of a capital offense be prevented by the state from honoring a contract for the services of competent counsel when the conviction under which he is held in custody for execution is assailed as having been obtained and upheld on appeal in violation of the Fourteenth Amendment and when the Supreme Court of the United States has ordered a federal Court hearing of the charges? May the state, in such circumstances, deny to the litigant-prisoner a right effectively to present competent evidence in proof of the charges by employing its naked power to seize, at its whim and pleasure, his valuable literary property and deny him all right to the use and sale of products of his mind?

6. Was Petitioner denied a basic requirement of due process and hence is the resulting judgment of the District Court invalid because the habeas corpus trial was held before a judge who entertained a personal, fixed and continuing bias against Petitioner and in favor of the State of California?

Should District Judge Louis E. Goodman have disqualified himself on the filing of the affidavit under 28 U.S.C. § 144 by Petitioner?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

[Rule 23-1(d).]

Constitution of the United States, XIV Amendment, Sections 1 and 5:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"The Congress shall have power to enforce by appropriate legislation, the provisions of this article."

Constitution of California, Article VI, Section 4½:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

California Penal Code, § 209, as in effect during Petitioner's trial:

"Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery or to exact from relatives or friends of such person any money or valuable thing, or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or

suffer bodily harm, or shall be punished by imprisonment in the State prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm."

California Penal Code, § 209, now in effect as result of 1951 amendment (Stats. 1951, ch. 1749, p. 4167):

"Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward, or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the state prison for life with possibility of parole in the cases where such person or persons do not suffer bodily harm.

"Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under this section as it read prior to the effective date of this act shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole."

California Penal Code, § 1239(b):

"When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel."

California Code of Civil Procedure, § 953(e):

"When it shall be impossible to have a phonographic report of the trial transcribed by a stenographic reporter as provided by law or by rule, because of the death or disability of a reporter who participated as a stenographic reporter at the trial, or because of the loss or destruction, in whole or in substantial part, of the notes of such reporter, the court or a judge thereof shall have power to set aside and vacate the judgment, order or decree from which an appeal has been taken or is to be taken and to order a new trial of the action or proceeding."

California Rules on Appeal, Rule 33(c):

"Where a judgment of death has been rendered and an appeal is taken automatically as provided by law, the entire record of the action shall be prepared. For the purpose of computing time for preparation of the record, the notice of appeal shall be deemed to have been filed at the time of rendition of the judgment."

California Rules on Appeal, Rule 35(b):

"Where a reporter's transcript is required, the clerk, immediately on the filing of the notice of appeal, shall notify the reporter. The reporter shall prepare an original and 3 clearly legible typewritten copies of the reporter's transcript, in the manner and form required by Rule 9, and shall append to the original and each copy a certificate that it is correct. He shall deliver the original and all the copies to the clerk immediately on their completion, and in no case more than 20 days after the filing of the notice of appeal, unless such time is extended as provided in subdivision (d) of this rule."

Title 28 United States Code, § 144:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit as to any judge. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Title 28, United States Code, § 2201:

"In a case of actual controversy within its jurisdiction, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Title 28, United States Code, § 2202:

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

Title 28, United States Code, § 2243:

"A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ of habeas corpus or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

"The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

"The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

"When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

"Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

"The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

"The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

"The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

Title 28, United States Code, § 2244:

"No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry."

Title 28, United States Code, § 2250:

"If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending."

STATEMENT OF THE CASE.

[Rule 23-1(e).]

A. History of the Instant Litigation.

The petition for the writ was originally filed in the District Court as No. 34375-Civil on December 30, 1954, after this Court had denied certiorari to the Supreme Court of California "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court." (*Chessman v. Teets*, No. 285, Oct. Term, 1954, 348 U.S. 864.)

On January 4, 1955, Judge Louis E. Goodman summarily denied the petition without hearing or requiring Respondent to answer. (R. 24, Vol. I; *In re Chessman,* 128 F.Supp. 600.)

Two days later, Judge Goodman refused to issue a certificate of probable cause. (R. 36, Vol. I.) Petitioner then applied to Chief Judge William Denman of the Court of Appeals for the certificate, and on January 11, 1955 Judge Denman certified there was probable cause to appeal and ordered that Petitioner's execution, then scheduled for January 14, 1955 be stayed. (R. 39-43, Vol. I; *Application of Chessman,* 219 F.2d 162.) The notice of appeal (R. 37, Vol. I), dated January 5, 1955 was filed and the appeal docketed as No. 14621 in the Court of Appeals.

After the cause was briefed and argued on a shortened time, on April 7, 1955 the order denying the petition for habeas corpus was affirmed by the Court of Appeals sitting en banc. (R. 47-48, Vol. I; *Chessman v. Teets,* 221 F.2d 276.) Rehearing was denied on May 6, 1955 and on May 12 the order amending the order denying rehearing was filed, with Petitioner's stay of execution being thereby terminated.

On May 13, 1955 Petitioner was resentenced to death, with the date of execution in the warrant fixed for July 15, 1955.

On June 30, 1955 the case was docketed in this Court and a petition for writ of certiorari was filed, No. 196, Oct. Term, 1955. Justice Tom Clark granted Petitioner's application for a stay of execution pending a decision on the petition for writ of certiorari, the stay order being filed by this Court's Clerk on July 6, 1955.

On October 17, 1955 this Court granted certiorari, reversed the Court of Appeals, and remanded the case to the District Court for a hearing. (*Chessman v. Teets*, 350 U.S. 3.) In its Per Curiam opinion, this Court discussed Petitioner's claims and held as follows:

> "Petitioner applied to the United States District Court of California, Southern Division, for a writ of habeas corpus, claiming that his automatic appeal to the California Supreme Court from a conviction for a capital offense had been heard upon a fraudulently prepared transcript of the trial proceedings. The official court reporter had died before completing the transcription of his stenographic notes of the trial, and petitioner alleges that the prosecuting attorney and the substitute reporter selected by him had, by corrupt arrangement, prepared the fraudulent transcript. On the record before us, there is no denial of petitioner's allegations. The District Court, without issuing the writ or an order to show cause, dismissed the application as not stating a cause of action. 128 F.Supp. 600. The Court of Appeals affirmed the order of the District Court. 221 F.2d 276. The charges of fraud as such set forth a denial of due process of law in violation of the Fourteenth Amendment. See Mooney v. Holohan, 294 U.S. 103. Without intimating any opinion regarding the validity of the claim, we hold that in the circumstances disclosed by the record before us the application should not have been summarily dismissed. Accordingly, the petition for a writ of certiorari is granted, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court for a hearing."

And in earlier certifying probable cause (*Application of Chessman*, 219 F.2d 162), Chief Judge Denman observed (R. 41, Vol. I):

"How important the California law regards this transcription [of the trial proceedings] and certification [as to its correctness] by the reporter is apparent from the fact that in *civil* cases the death of the reporter before his transcription and certification, gives the trial court the discretionary power to set aside the judgment and order a new trial. California Code of Civil Procedure, § 953(e). By some quirk in California legislation this does not apply to criminal cases. However, it is obvious that if the reporter's transcript is so important as to give the court such power in a civil case, *a fortiori* it must have such importance in a criminal case in which, on the evidence to be transcribed, the accused is sentenced to death. Likewise its importance is emphasized by the California law making the appeal automatic from death sentences. California Penal Code, § 1239(b)."

This Court's mandate came down and was filed in the District Court on November 28, 1955. (R. 53, Vol. I.) On November 30, 1955, Oliver J. Carter, the Judge then sitting in the Master Calendar Department, assigned the proceeding back to Judge Louis E. Goodman over the objection of counsel for Petitioner. (P.T.R. 2-6, Vol. II.)

Judge Goodman rejected counsel for Petitioner's suggestion he disqualify himself (P.T.R. 7-13, 19-20, Vol. II), ordered Petitioner's execution stayed (R. 54, Vol. I), and issued a writ of habeas corpus returnable December 8, 1955. (R. 55, Vol. I.)

Subsequently, on December 30, 1955, Judge Goodman ordered stricken (R. 120, Vol. I) an affidavit, accompanied by the required certificate of counsel, filed December 29, 1955, under 28 U.S.C. § 144, which sought

to disqualify him from hearing the matter. (R. 101, Vol. I.)

The uncontradicted facts set out in the affidavit show: that Judge Goodman's intemperate language in his earlier opinion, reversed by this Court, and rebuking this Court for suggesting the filing of the petition, as well as demanding rhetorically, "When does the wheel stop turning? What must the citizen think of our 'nickel in the slot' administration of criminal justice?" gave judicial sanction to public passion and prejudice. That the angry words of that opinion, further, were used to fan the fires of hatred against Petitioner and to create a climate of hysteria, as detailed in the affidavit. (R. 101-105, Vol. I.) That, during the course of the pre-trial proceedings, Judge Goodman repeatedly complained that the case was before him, said it belonged in the California Courts, and referred to his Court as a laundry. That he assured Petitioner he would change his custody and then refused to do so, even after Respondent's counsel joined in motioning for such transfer; and that, in the circumstances shown, "not only does Judge Goodman refuse to give [Petitioner] any opportunity to prepare and is willing to let him be subjected to intolerable conditions, but he further refuses to grant [Petitioner] reasonable time to prepare." (R. 105-118, Vol. I.)

Petitioner was produced in Court on December 8, 1955, and hearing of the matter was set for January 9, 1956, then put over one day to January 10, 1956, and later reset for January 16, 1956.

On December 8, 1955, Judge Goodman made an order that Respondent should permit Petitioner to consult freely

and privately with his counsel at the prison between the hours of 9 a.m. and 6 p.m. on all days pending the hearing. (R. 59, Vol. I.) This order was amended on December 21, 1955 to permit an investigator and witnesses also to consult freely and privately with Petitioner. (R. 100, Vol. I.)

But Judge Goodman refused to enforce these orders. (R. 110-117, Vol. I.) Pending the hearing, Petitioner repeatedly motioned to be transferred from San Quentin Prison to the San Francisco County Jail, in custody of the United States Marshal, on the grounds he was being prevented from preparing his case for hearing, that conference conditions were prohibitive at the prison, that Respondent was subjecting Petitioner and his counsel to every conceivable type of harassment, and that Judge Goodman's amended order was being openly and flagrantly violated by Respondent. (R. 60-79, 86-87, 89-98, Vol. I; see R. 109-117, Vol. I, and P.T.R. of November 30, and December 8, 16, 21 and 22, 1955.)

None of the facts presented in the affidavits or stated by counsel in Court was disputed or denied. Not a single counter-affidavit was filed.

All of these motions for transfer were denied by Judge Goodman (R. 48, 59, 99, Vol. I), even after counsel for Respondent joined in one of the motions. (P.T.R. 148, 176, Vol. III.) A fair sample of Judge Goodman's unusual reaction and attitude toward counsel's attempts to secure adequate opportunity to prepare under reasonable conditions is revealed by his comments: "So he cannot conduct his conferences in a plush room in the Mark Hopkins Hotel;" "A lawyer has got to go out in the

rain;" "you have got to wear your old clothes over there, Mr. Davis, and make the best of the little rough going, you see;" "this should be in the State of California, but until there is some change in the statutes, we have got to use this laundry to take care of this matter instead of the State of California;" "I don't like to make an order" enforcing Petitioner's rights, because it was a state case; and "we cannot control what the higher courts or what Congress determines are matters that can come into this court." (P.T.R. 89-90, 124-125, 129, 136, Vol. III; see R. 109 et seq., Vol. I.)

Yet when the matter was first brought up and his qualification to hear the case had been raised by counsel, Judge Goodman stated without qualification that Petitioner was entitled to an order transferring custody and that he would make it. (P.T.R. 14, Vol. II.)

On December 30, 1955, following the filing of the above-mentioned affidavit to disqualify him, Judge Goodman offered to transfer Petitioner to Alcatraz, terming the offer "unprecedented" and giving the impression that, if accepted, Petitioner then would be placed in a position to prepare. (P.T.R. 187-190, Vol. III.) Petitioner immediately accepted but, learning of the dangers of accepting blindly, asking only that he be transferred with such directions to the Warden of Alcatraz as would make the purpose of the transfer meaningful. (R. 123, 125, 128, Vol. I.) Petitioner's counsel, by a phone call to Warden Madigan, had been warned that if Petitioner were to be transferred without such orders Petitioner would be confined in what amounted to solitary confinement; he would find himself in an even worse situation than pres-

ently existed at San Quentin. (R.134-138, Vol. I.) Judge Goodman, not denying this, chose instead to chide Petitioner and his counsel for not accepting his "unprecedented" offer blindly and unconditionally, and refused to make the transfer. (R. 126; see R. 128, 130, 132, Vol. I.)

Having exhausted his funds and credit, some $10,000 having been spent in litigation of the case since Judge Goodman's earlier "wheel-turning," "nickel-in-the-slot" adverse decision, its reversal by this Court, and in preparation for the hearings, Petitioner was obliged to file an affidavit seeking to proceed in forma pauperis on January 7, 1956. (R. 139, Vol. I.) On January 10, 1956, Judge Goodman, while expressing doubt it would mean anything, granted Petitioner leave to proceed in forma pauperis. (R. 157, Vol. I.)

Petitioner's motion to make the People of the State of California a respondent in the proceedings (R. 127, Vol. I) was denied. (R. 215, item 9(a), Vol. I; P.T.R. 220-224, Vol. III.)

This motion was made in advance of the hearings, on January 7, 1956. The grounds of the motion as stated therein were:

> "1. The People of the State of California are in fact and in law the real party in interest.
>
> "2. It is the People of the State of California's officers, agents and judicial officers who are charged with fraud, and unless the People are made a respondent, answerable directly to the Court, petitioner, through a technicality, will be foreclosed from calling and questioning these officers, agents and judicial officers, as adverse parties, rather than as merely hostile witnesses, and thus petitioner will be kept

from impeaching [them] and not being bound by their testimony, as permitted by Rule 43(b) of the Federal Rules of Civil Procedure.

"3. Unless petitioner is released from this technicality and is permitted to call and question these adverse parties in fact as adverse parties he will be greatly handicapped, if not virtually precluded, in and from proving his charges."

The District Court, on hearing the motion, declined to make the People a respondent but withheld final decision. (P.T.R. 220-224, Vol. III.) The motion was renewed during the hearings and rejected. (R. 215, item 9(a).) The District Court adopted the position that it was free to decide, at its pleasure, how much or how little latitude would be allowed in the examination of the three adverse witnesses (the prosecutor, J. Miller Leavy; the substitute reporter, Stanley Fraser; and the trial Judge, the Hon. Charles W. Fricke), as well as free to exercise its own discretion, rather than being bound by Rule 43(b), F.R.C.P., in determining the binding effect of their testimony upon Petitioner. (See P.T.R. 191-193, Vol. III; H.R. 173-176, Vol. V.)

Although J. Miller Leavy, the trial prosecutor charged by Petitioner with connivance and fraud in the preparation of the disputed reporter's transcript, was to be a material witness at the hearing and had a vital personal interest in its outcome (his job, future and reputation were at stake), the District Court permitted him to appear as one of the counsel for Respondent over the strenuous objections of Petitioner's counsel. (H.R. 3-9, Vol. IV.)

By written motion, Petitioner, proceeding of necessity in forma pauperis, asked the District Court to order that the dead reporter's shorthand notes be photostated and furnished Petitioner without cost. (R. 145, Vol. I.) When the hearings began, Petitioner renewed the motion, it not having yet been finally acted upon, making it under 28 U.S.C. § 2250. (H.R. 15-17, Vol. IV.) The District Court declared that section did not permit it to make such an order. (H.R. 17-18, Vol. IV.) While it indicated there was another provision of which Petitioner might avail himself (H.R. 19, Vol. IV), Petitioner did not and does not know what it is, and the District Court never said. Thus Petitioner was not able to secure photostatic copies of the notes by the shorthand reporter, essential to effective preparation and presentation of his case, because of his untimely poverty.

Under the provisions of 28 U.S.C. §§ 2201 and 2202, Petitioner filed an application for declaration of rights (R. 168, Vol. I), with supporting affidavits and exhibits. (R. 170, 174, 198, 199.) The purpose of the application was to secure a favorable ruling on Petitioner's right to reclaim his valuable literary property—the manuscript of an unpublished novel titled *The Kid Was a Killer,* authored by Petitioner—which had been seized by Respondent and held against the will and over the protest of Petitioner, and the release of which would have enabled Petitioner, at the time compelled to proceed as a poor person, to produce his own expert witness, as well as other witnesses, and to bear the cost of litigation and pay for the photostating of the shorthand notes.

A second purpose of the application was to secure a judicial declaration that the agreement entered into between Petitioner and George T. Davis, one of his counsel, was a valid one which Respondent must permit Petitioner to honor. Therein Petitioner, an established author, agreed to do a biography of the life and career of Mr. Davis in return for the major portion of the latter's fee, but Respondent had arbitrarily refused to allow Petitioner to do this writing, although Petitioner had no other means of securing the services of Mr. Davis, counsel in whom he had full trust and faith.

Judge Goodman summarily denied the application from the bench (1) on the primary ground that he had no "jurisdiction" to declare Petitioner's rights in a habeas corpus proceeding, and (2) on the second ground that he could not interfere with the "security regulations" at the prison. (H.R. 915-916, Vol. X.)

The ordered hearings were held, with Petitioner present, on January 16, 17, 18, 19, 20, 23 and 24, 1956. (H.R. 1-919, Vols. IV-X.)

On January 25, 1956, Judge Goodman ordered the matter submitted (H.R. 920-923, Vol. XI), and on January 31, 1956, Judge Goodman vacated the stay of execution, discharged the writ and remanded Petitioner to custody of the Respondent for execution. (R. 204-215, Vol. I; *Chessman v. Teets,* 138 F.Supp. 761.)

Petitioner applied to the District Court for a certificate of probable cause to appeal on February 10, 1956. (R. 218, Vol. I.) On February 15, 1956, Judge Goodman refused to issue the certificate. (R. 251, Vol. I.)

Thereafter, on February 29, 1956, Chief Judge William Denman of the Court of Appeals certified probable cause (R. 252-254, Vol. I), and on that same date Petitioner filed his second notice of appeal. (R. 255, Vol. I.)

Pursuant to the provisions of 28 U.S.C. § 1915, on his application, Petitioner was granted leave to prosecute the appeal in forma pauperis and on a typewritten record. (R. 261, Vol. I.)

On October 18, 1956, the Court of Appeals affirmed the order of the District Court (R. 287, Vol. I). The majority opinion (R. 264-281, Vol. I; *Chessman v. Teets*, ... F.2d .....) was written by Judge Frederick G. Hamley and concurred in by Judge Dal Lemmon.

Chief Judge William Denman dissented. In his dissenting opinion (R. 18-22, Vol. I; .....F.2d ....., at .....), Judge Denman maintained that the majority opinion "proceed[ed] on a piecemeal application of the Fourteenth Amendment," and that, under the fact situation disclosed by the record, the state trial Court's order "creating the record must be set aside and the California Supreme Court's affirmation based on that record also must be set aside and the trial for the determination of the record proceed anew in the Los Angeles Superior Court with Chessman participating therein."

A timely filed petition for rehearing was denied November 20, 1956. (R. 287, Vol. I.) Again Chief Judge Denman dissented. He stated (R. 289, Vol. I):

> "This is clearly a case where the court first finds that the due process clause of the Fourteenth Amendment applies for all appeals created by state law

and then in this appeal, a matter of life or death to the appellant, says that it is inapplicable to a trial to determine the text of the record upon which the death sentence is to be determined as valid or invalid."

One week following the denial of rehearing, Judge Lemmon, speaking for himself, filed an extraordinary memorandum opinion (R. 292-295, Vol. I), in which he attacked Chief Judge William Denman, argued angrily—"If the English language means anything at all"—according to his legal and semantic view of the matter, that his Court was jurisdictionally barred from considering the question whether Petitioner had a constitutional right to be present at the settlement proceedings, but had considered the question nevertheless, and that "The matter should end there."

Judge Lemmon also maintained that Petitioner should be denied relief because "Nowhere does Chessman claim that he is innocent"—which is an extreme untruth, as will be shown. Judge Lemmon emphatically asserted further that the case should be decided by rigorous application of what he personally is convinced the habeas corpus law should be, not what it actually is. He stated, "The 'law's delay' in this case has become a national scandal," and concluded:

> "There remains only one more step to be taken in the case of the State of California versus Caryl Chessman. That step will be to carry out one of the two sentences of death entered against Chessman eight and a half years ago.

"Chessman has been accorded all due process except the long overdue process of his execution. By such execution, perhaps, the blot upon California's juristic escutcheon will be, if not wholly erased, at least partly dimmed."

(The following day, November 28, 1956, Chief Judge Denman filed his own memorandum opinion answering Judge Lemmon and reaffirming his own position, R. 295-297.)

The unfortunate consequences attending Judge Lemmon's intemperate opinion were what might be expected. For example, the black headline in the San Francisco *Call-Bulletin* for November 28, 1956, read: U. S. JUDGES ROW OVER CHESSMAN, and the lead paragraph of the story stated: "Judge Dal M. Lemmon, of the U. S. Court of Appeals, here today scathingly attacked his court's Chief Judge William Denman for the latter's stand that Caryl Chessman had been denied due process of law."

The story was sensationally reported in Bay Area and California newspapers. It was disseminated nationally by the major wire services. One representative editorial, published in the San Francisco *Examiner* on December 1, 1956, asserted:

"We agree with Judge Lemmon of the United States Court of Appeals that the law's delays in the Caryl Chessman case are a national scandal. . . .

"After this Chessman will come other Chessmans. So long as such creatures are permitted to subvert justice at will by misusing the right of writ of habeas corpus, that long will the blot remain.

> "Judge Lemmon and all other judges and members of the bar can best erase the blot by bringing about reforms [sic!] in the use of the writ. Only thus can be ended what Judge Goodman so precisely described, in this same Chessman case, as 'nickel-in-the-slot' administration of justice."

As a result of Judge Lemmon's opinion, Petitioner's execution was demanded forthwith and feeling against him was whipped to hysterical pitch.[1]

In such an atmosphere, Petitioner now brings his case to this Court for an impartial and judicial review.

B. Proceedings in the State Courts Relative to the Preparation, Settlement and Acceptance of the Reporter's Transcript.

Petitioner had been tried in the Los Angeles County Superior Court before a jury for the alleged commission of 18 felony charges. (The original trial record is before this Court as part of Petitioner's Exhibit 1, records of the California Supreme Court in Crim. 5006, *People v. Chessman.*)

The trial was a lengthy one, beginning April 29 and ending May 21, 1948. Petitioner defended himself. Eighty-one witnesses testified and were called or recalled a total of more than 120 times. (See Rep. Tr., Vol. 1, General Index to Witnesses, pp. i-v.) It will be noted the testimonial evidence alone comprises 1500 pages of the disputed Reporter's Transcript. (Rep. Tr. pp. 55-1558.) Eighty-four exhibits were offered. (See Rep. Tr., Vol. 1,

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[1]Fortunately, the members of this Court are not required to blind themselves as judges to what is common knowledge and what they know as men. (*Watts v. Indiana*, 338 U.S. 49, 52.)

Index to Exhibits, pp. vi-x.) There were two full days of argument to the jury. (Rep. Tr. pp. 1559-1786.) More than 50 different complex instructions were given. (Cl. Tr. pp. 83-134.)

On May 21, 1948, Petitioner was found guilty of 17 of the charged felonies, acquitted on one. (Cl. Tr. pp. 172-222.) Motion for new trial was denied and judgment rendered on June 25, 1948, and Petitioner was then sentenced twice to death[2] and to 15 terms of imprisonment.[3]

The official court reporter died unexpectedly June 23, 1948 (Death Certificate of Ernest R. Perry; Pet. Ex. 18),[4] which was after the trial and before he had completed some 1200 pages of testimony, plus another 300 pages

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[2]For two violations of section 209 of the California Penal Code, charging Kidnaping for the Purpose of Robbery, with a finding of bodily harm by the jury and a fixing of the punishment at death.

[3]For two violations of section 209 of the California Penal Code, charging Kidnaping for the Purpose of Robbery, with a finding by the jury of bodily harm and a fixing by the jury of the punishment at life imprisonment without possibility of parole as to one count and no finding as to bodily harm on the other count; for two violations of section 288a of the California Penal Code; for one count of Attempted Rape; for one count of Grand Theft, of an automobile; for 8 counts of First Degree Robbery; and for one count of Attempted Robbery.

[4]Before this Court, as part of the certiorari record, are the original exhibits of both Petitioner and Respondent which either were received in evidence or marked for identification in the District Court. Petitioner's Exhibits 1 to 18, 20 and 21 were received in evidence. (H.R. 152-157, 181, Vol. V; 296, 317, 348, Vol. VI; and 570, Vol. VII.) Petitioner's Exhibits 19 and 22 were marked for identification only. (H.R. 330, Vol. VI, and 582, Vol. VII.) Respondent's Exhibits A, B, D, E, F, G-1 through G-6 and H were received in evidence. (H.R. 109, Vol. IV; 277, Vol. V; 387, 396, Vol. VI; 487, Vol. VII; and 905-906, Vol. X.) Respondent's Exhibits C and I were marked for identification only. (H.R. 298, Vol. VI; 831, Vol. X.)

of the voir dire examination of prospective jurors and the prosecutor's opening address.

Immediately following the pronouncement of judgment, Petitioner moved the trial Court, the Honorable Charles W. Fricke, to set aside and vacate the judgment on the ground it was impossible to prepare a record for use on the automatic appeal. The motion was denied. Judge Fricke stated: "The Court will take judicial notice that Ernest R. Perry, who reported the trial, is dead." He then directed preparation of the record "to the limit of human beings in their use of human ingenuity." (Pet. Ex. 1, Jacket 3; Rep. Supp. Tr. on appeal, proceedings of June 25, 1948, pp. 14-16.)

Preparation of the record by this unique means, under the direction of J. Miller Leavy, Petitioner's prosecutor, was undertaken and Leavy finally selected his uncle-in-law, Stanley Fraser, to attempt a transcription of the dead reporter's shorthand notes. A contract between Fraser and the Los Angeles County Board of Supervisors was entered into, cancelled, and then renegotiated, on the positive but unverified representations of Leavy that not only Fraser, but other reporters as well, could read the notes. (Pet. Exs. 2, 3 and 4, Secretary of Superior Court file, Board of Supervisors file, and copies of minutes of Board of Supervisors authorizing two Fraser contracts, respectively.)

Petitioner sought a writ of prohibition against preparation of this transcript on the ground the notes could not be transcribed with any reasonable degree of accuracy and, in opposition, both Leavy and Fraser swore Petitioner was wrong and that what amounted to a "ver-

batim" transcript of the trial proceedings was being prepared by Fraser. Leavy further swore that Petitioner would have the transcript delivered to him "in court" and would be allowed to make any objections he might have to it at that time. On the basis of these sworn statements, the California Supreme Court summarily denied the writ. (Pet Ex. 1; *Chessman v. Superior Court*, Crim. 4950: petition and opposing memorandum and Leavy and Fraser affidavits in support of opposition.)

Preparation of the record thus was permitted to continue. After many months and extensions of time (see Pet. Ex. 1; file of extension Nos. 2692, etc.), on February 24, 1949, Leavy offered the partial Fraser reporter's transcript for filing in the trial Court. He then said: "In order for Mr. Fraser to complete this record *it has been necessary to submit to me the rough draft form in order that I may read it before he has copied it into final form.*" (Pet. Ex. 1, Jacket 3; Rep. Tr. of Proceedings re Filing of Rep. Tr. on April, p. 3.)

On April 11, 1949, on filing the remainder of the transcript, Leavy represented to Judge Fricke: "I have read this entire record, not only every page but *I feel I have read every word and the only correction I find is the one I am offering at this time . . . I feel this record . . . what Mr. Fraser prepared from Mr. Perry's notes, is as accurate a record as Mr. Perry could have prepared . . .*" (Ibid. pp. 10-11.) At this same time, Leavy represented further: "*. . . he [Fraser] got so he could read Mr. Perry's notes better than his own . . .*" (Ibid. p. 11.)

Appellant's copy of the Fraser transcript was then mailed to Petitioner at San Quentin and was delivered to

him in his death cell. Petitioner[5] then prepared and mailed to the trial Court in Los Angeles his "Motion to Augment and Correct Record," with a long list of noted omissions and requested corrections and with a supporting affidavit. (Pet. Ex. 11.)

In the motion, Petitioner explicitly stated: "That, as provided by Rule 35(c), Rules on Appeal, Defendant-Appellant moves a hearing be ordered to determine the jurisdictional question hereinabove raised, to enable the Defendant-Appellant to determine actually the ability of Mr. Fraser to read Mr. Perry's notes, and to enable the Defendant-Appellant to offer a showing this is not, and challenge it as, a usable transcript, and to enable the Defendant-Appellant to point out to the Court the many inaccuracies and omissions in this transcript, to prove these inaccuracies and omissions, and for the Court to determine these matters and then if this reporter's transcript can be, in a manner satisfactory and legal, corrected and completed, promptly to do so that the Defendant-Appellant may take his automatic appeal forthwith to the Supreme Court of this State." (Pet. Ex. 11: motion, pp. 2-3.)

Petitioner's express application to be produced in the trial Court in Los Angeles when the Fraser transcript was settled was first denied *without prejudice* by the California Supreme Court (Pet. Ex. 1; application and order of denial in file of Crim. 5006) and simply ignored by the trial Court, Judge Fricke (Pet. Ex. 17: "Affidavit Responsive

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[5]Petitioner, at the time of the settlement of the disputed transcript was appearing *in propria persona*, without representation by counsel. He has been held in San Quentin Prison's Death Row, awaiting execution, since July 3, 1948. For five years and ten months from that date he continued to represent himself (H.R. 564-565, Vol. VII.)

to Reporter's Transcript of Proceedings Re Filing of Reporter's Transcript on Appeal.")

The Fraser transcript was settled on June 1, 2 and 3, 1949 at proceedings conducted by Judge Fricke in the absence of Petitioner, with Leavy actively participating as counsel for the People. (Pet. Ex. 1, Jacket 3: Rep. Tr. of Proceedings re Settlement of Rep. Tr. on Appeal.)

At that time, Judge Fricke admitted: "This situation in which we find ourselves with reference to preparing a proper transcript on appeal is one of those wholly unanticipated situations which is not specifically covered by the rules of the Judicial Council relating to appeals . . ." (Ibid. pp. 16-17.)

Instead of offering Petitioner counsel and holding a *hearing* on Petitioner's motion, Judge Fricke elected rather to criticize the fact Petitioner was forced to represent himself, stating: "So we find the defendant has also handicapped himself by refusing to have the aid of counsel . . . where as a matter of fact the situation is one in which he should have had counsel . . ."

Petitioner's sworn claims, appearing in the affidavit in support of the motion for a hearing, that Fraser had misrepresented his ability to read the shorthand notes, that Leavy had been guilty of hoodwinking the California Supreme Court, etc., were met by being brushed aside with Judge Fricke's statement that: "I realize the defendant, being on the defense side of the case, has an impression that everybody is against him and nobody is willing to do anything for him and that everybody is hostile to him; but I think such a conclusion is the result of a biased mind

and is not warranted by anything appearing in the record." (Ibid. p. 18.)

Stanley Fraser then was called and testified self-servingly under questioning by Leavy. (Ibid. pp. 19-26.)

Leavy stood by while Judge Fricke allowed 80-odd specific corrections proposed by Petitioner in his written list and denied some 140 others. (In view of Leavy's earlier statements—that he had found only *one* correction and that the Fraser transcript was "as accurate a record as Mr. Perry could have prepared"—the volume of allowed corrections and their character is of extreme significance as evidence of the admitted inaccuracy of the record.)

The Fraser transcript then was "approved" by Judge Fricke and filed with the California Supreme Court (ibid. p. 82). Petitioner immediately challenged its validity and adequacy in this latter Court by the institution of mesne proceedings.

Then, on August 18, 1949, Leavy presented himself to Judge Fricke, asked the record to show "we are proceeding in open Court on a regular Court day, and may the record show I have subpoenaed as witnesses here today" Ed Bliss and Al Matthews. Leavy asked the record to show further that Petitioner had an appeal pending in the State Supreme Court from the settlement and certification of the Fraser transcript and a motion "to compel this [Superior] Court to permit him to be present in Court when there is a further settlement of the record, and to attempt to compel the Supreme Court in some way to claim this record is not usable . . . In order to meet the appeal and motion," he asked to call the two witnesses.

(Pet. Ex. 1, Jacket 3: Supplemental Reporter's Transcript on Appeal as of August 18, 1949, pp. 2-3.)

In the face of this candid admission by Leavy that he wished to use the trial Court and its processes to foreclose a hearing on Petitioner's claims and to keep Petitioner out of Court, Judge Fricke stated:

> "I will allow the taking of testimony with the idea of assisting the Supreme Court in the determination of the motion . . . and to shed further light on matters which are not covered."
>
> (Ibid. pp. 3-4.)

The two witnesses, adverse to Petitioner, then proceeded to give their testimony in the absence of Petitioner.

Still over Petitioner's vigorous objections, with portions being ordered added to it but with hearings on its validity and adequacy never being held, this Fraser transcript was ultimately accepted by the California Supreme Court[6]

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[6]That court admitted the challenged transcript was "prepared in a situation for which the Rules on Appeal do not expressly provide" (p. 458 of 35 Cal.2d); that "Concededly the reporter's transcript is not a verbatim record of every word that was said in the trial court" (p. 461 of 35 Cal.2d); that it was not certified as correct as required but only certified to be correct to the best of the substitute reporter's ability (pp. 458-459 of 35 Cal. 2d). While recognizing that, under State law, Petitioner was entitled to the *entire* record (p. 459 of 35 Cal.2d), the court refused to order the record augmented to include what is indicated in the transcript as a "(Discussion as to subpoenaing witnesses)" (Pet. Ex. 1: Rep. Tr. p. 10), and a "discussion between the trial court, counsel and the defendant (Chessman), and conceded by the deputy district attorney, that an attorney, William Roy Ives, given the opportunity to prepare the case, would appear with or for the defendant," (p. 465 of 35 Cal. 2d), both discussions taking place after the cause was called.

Finally, while recognizing that a determination of whether one reporter can transcribe another reporter's shorthand notes "is essentially a question of fact to be determined in each case in which it may arise" (p. 461 of 35 Cal.2d), and while placing the burden

(*People v. Chessman*, 35 Cal.2d 455 [218 P.2d 769, 19 A.L.R.2d 1084]), and subsequently used on the mandatory appeal as a basis for affirming the death and other judgments imposed (*People v. Chessman*, 38 Cal.2d 166 [238 P.2d 1001]).

C. The District Court Hearing: The Manner in Which It Was Conducted by Judge Goodman; What Was Proved and What Was Not Permitted to Be Proved.

On testifying in the District Court, Judge Fricke, Leavy and Fraser denied generally any fraud, connivance or collusion in the preparation of the Fraser transcript. (However, as will be shown, Petitioner established every fact alleged in the peti n (R. 7-23, Vol. I) which he was permitted to establish. As further will be shown, he sought and was prevented by Judge Goodman from proving the remainder of the facts alleged.)

Judge Goodman's biased attitude toward Petitioner and his counsel, Mr. Davis and Miss Asher, from the beginning to the end of the hearings is manifest in the record. He told Mr. Davis, practically at the outset, he was "taking too much time" and snapped "That's a silly question". (H.R. 78-79, Vol. IV.) A reference to the cited pages of the record shows that Mr. Davis was proceeding

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of proving the prejudicial inadequacy of the transcript upon Petitioner (p. 462 of 35 Cal.2d), and noticing that Petitioner "urged that he should have been allowed to appear personally in the proceedings which resulted in the present reporter's transcript, and that he should now be allowed to appear personally before the trial judge in support of his position" (p. 467 of 35 Cal.2d), by denying his motions that he be allowed to appear in the Superior Court, adduce evidence and call hostile and unwilling witnesses, the Court itself foreclosed Petitioner from proving the record inadequate, and this was candidly admitted to be done as a discriminatory penalty for self-representation (p. 467 of 35 Cal.2d). See the dissenting opinions of Mr. Justice Carter and Mr. Justice Edmonds (pp. 468-473 of 35 Cal.2d).

as rapidly as possible and that the question, dealing with the extensive pencilled additions made by Fraser in the Perry notebooks (Pet. Ex. 16-A to K) was not "silly" but highly relevant.

While Leavy and Fraser were accused of conspiring to produce a fraudulent transcript, Judge Goodman would not permit Mr. Davis to question Fraser as to whether he and Leavy had discussed their anticipated testimony. "A jury might sometimes be impressed with that; I am not," Judge Goodman said. (H.R. 223-225, Vol. V.)

Although Fraser's status as a Court reporter and qualifications were directly in issue, Judge Goodman declared, while Fraser was being examined by Mr. Davis, "I am not interested in habeas corpus in a history of the witness" and "We are not concerned on habeas corpus with the qualifications or background of any of these people." (H.R. 176 and 177, Vol. V.)

The petition alleged the shorthand notes of the deceased reporter were "undecipherable to a large degree" and that Fraser was "incompetent to transcribe" those notes. (H.R. 9-10, Vol. I.) Yet, almost at the outset of the questioning of Fraser by Mr. Davis, Judge Goodman announced flatly that he was not going to allow the accuracy of the Fraser transcript or the ability of Fraser to transcribe the notes to be tested. (H.R. 248, Vol. V.) He stated further:

> The Court. Of course I don't know what he [Fraser] put down in the transcription.
>
> Mr. Davis. That's why I am trying to find out.
>
> The Court. I don't think the Supreme Court of the United States intended me to spend in this court

days or weeks of time in determining the accuracy of this transcript. *Whether they did or not, I am not going to do it.*

Mr. Davis. Well, could we have perhaps ten minutes on that?

The Court. That is not an issue in this case. This man [Fraser] could have been the most incompetent reporter in the world and he could have made a mess of the transcript in typing it, and that does not raise any federal question. The State of California and the parties to that litigation could determine that. (H.R. 249, Vol. V.)

And then:

The Court: That is right, I am not going to test his [Fraser's] ability in this proceeding or whether or not his statement that he transcribed this—made this transcript correctly is correct or not. . . .

If there is any failure of due process, as the Supreme Court has said, involved in this, that is another question. But the mere accuracy of it—it could be—*it could be 75 percent wrong, and it wouldn't raise any federal question.* (H.R. 250, Vol. V.).

Judge Goodman added: ". . . but what the State of California affords by way of methods of providing a transcript is not the subject or concern of this Court." (H.R. 250, Vol. V.)

Mr. Davis then made a detailed offer of proof. Judge Goodman gratuitously called it "an argument about what your views are on the matter," and added glibly, "I may be spending my time here listening to disputes between you and some other reporters about whether a certain symbol was blue instead of green . . ." (H.R. 252, Vol. V.)

For attempting to get Fraser to read unaided, if he could (which he finally admitted he could not), just one specified page of the shorthand notes from the stand, and taking the position Fraser might confer with those charged with him with fraud if he attempted a transcription overnight, Judge Goodman charged Mr. Davis with acting in bad faith. "It just leaves me utterly cold," Judge Goodman said. For stating Petitioner's position, Mr. Davis was accused by Judge Goodman of making "speeches," "and they just don't make any impression on me." Judge Goodman said Fraser couldn't be expected to transcribe that one page in the courtroom. "We can't do it. It's silly." Judge Goodman then tried to force Mr. Davis to say he didn't trust the Court merely for not agreeing to have Fraser attempt a transcription out of Court and under conditions where Fraser could refer to his own transcription and consult with Leavy. Judge Goodman finally said Fraser could do the transcription of that one already identified page of the notes the next day in chambers and Mr. Davis was forced to drop the matter. Such a test would have been meaningless. Overnight Fraser would have had every opportunity to check with his transcription and study the photostatic copy of the notes in Leavy's possession. (H.R. 282-293, Vol. V.)

Paul Burdick, a retired Court reporter, and the "warm friend" of Judge Fricke, Fraser and Leavy (H.R. 707-711, Vol. VIII), had been hired by the state, through Leavy, and exceptionally well paid (H.R. 732-737, Vol. IX) to check the Fraser transcript against the Perry notes.

Mr. Burdick testified for respondent that Fraser's was a very accurate transcription and that the Perry notes

showed the disputed jury instructions to be exactly like the transcript. (H.R. 699, 704, Vol. VIII.) Counsel for respondent had stated, "Furthermore, the man [Burdick] is an expert. He is certainly entitled to give his opinion as to the accuracy of *this* transcription," and the Court agreed. (H.R. 697, Vol. VIII.)

Yet, on cross-examination, Burdick asserted he hadn't said he was an expert on Perry's shorthand and Judge Goodman interrupted to state, "He didn't say that," although he had, and, over counsel for Petitioner's objection, had been allowed to answer questions on the basis of that qualification. (H.R. 724, Vol. VIII.) Burdick then admitted he could not read a whole page or a half of a specified page of the Perry notes! He could only make out an occasional word or two. (H.R. 725, Vol. VIII.)

Then came a succession of further startling admissions from Mr. Burdick: he had found places where argument was left out; where Perry had "skeletonized" his notes; where for six to eight pages the going was "fast and rough"; where words were left out; where as many as seven or eight lines of Perry's shorthand symbols had not been transcribed on argument on the admissibility of testimony. (H.R. 748-753, Vol. IX). Perry's notes were "difficult to read"; at places they were "shattered" and "shattered clear out of recognition." (H.R. 775-777, 785, Vol. IX.) The notes on the disputed instructions to the jury were "pretty well cluttered up with those pencilled notations" of Fraser, and those notes, too, were "*shattered.*" Burdick couldn't read them. (H.R. 789, 792 et seq., Vol. IX.) Judge Goodman then took occasion to state hastily that he was not concerned with the ability of the

witness to decipher the notes before him. (H.R. 795, Vol. IX.)

With Judge Goodman's summary denial of Petitioner's application for declaratory relief (H.R. 916, Vol. X; R. 168, Vol. I), Petitioner was foreclosed from producing his own expert. (R. 198, 200-201.) This expert, Petitioner had been informed, was prepared to testify the Perry notes could not be transcribed with any reasonable degree of accuracy and that the Fraser transcript could not have been prepared in material part from those notes. (R. 199-200, Vol. I.)

The Harry Person letter of September 16, 1948, set out in the petition (R. 9-10, Vol. I) *was* written. (Pet. Ex. 3, true copy in this file; H.R. 69, Vol. IV.) Judge Fricke *had* heard, he testified, that the notes could not be transcribed with sufficient accuracy and that other reporters had examined the notes and could not read them but Leavy had represented to him that Fraser could. (H.R. 862-863, 875, 860, Vol. X.)

Judge Fricke testified he *had* told Leavy to get the Perry notes and see that they were placed in the custody of the Secretary to the Superior Court (H.R. 846, Vol. X), and Leavy had told Judge Fricke this had been done. (H.R. 847, Vol. X.) But it was *never* done. The Perry notes were kept either by Leavy or Fraser from 1948 and, when Fraser had completed the transcription, he still retained them. As late as 1954, they were stored by Fraser's brother in a garage (H.R. 390, Vol. VI, 503, Vol. VII), and Judge Fricke never knew this. (H.R. 849, Vol. X.) Then the notes were put in a safety deposit box by Cecil Luskin and Leavy (H.R. 81, Vol. IV, 503-504, Vol. VII),

with the alleged and intended result that Petitioner never was able to have them examined until they were produced in the District Court in December, 1955. They were kept suppressed by Leavy.

Fraser *was*, as alleged, paid over three times the statutory fee for his preparation of the Fraser transcript. (H.R. 208-209, Vol. V.)

The alleged relationship between Leavy and Fraser *did and does* exist. Fraser was and is the uncle-in-law of Leavy (H.R. 170, Vol. V, 452, Vol. VII), a fact kept concealed from Judge Fricke until after the transcript was settled. (H.R. 860-861, Vol. X.)

Fraser admitted he *did* let Leavy check the "rough draft" and *did* "get his [Leavy's] corroboration, his ideas, his recollection in places where I had difficulty . . ." (H.R. 399, Vol. VI.) Leavy admitted he *did* check the rough draft at both his home and office from time to time —on perhaps more than 25 separate occasions—and satisfy his mind Fraser "had it." (H.R. 531-532, 536, Vol. VII.)

Without the knowledge of Judge Fricke (H.R. 870-871, Vol. X) or Petitioner (H.R. 592, Vol. VIII), but *with* the knowledge and at the suggestion of Leavy (H.R. 504, 533, Vol. VII), Fraser had conferred with two key prosecution witnesses, Los Angeles Detectives Lee Jones and Colin Forbes, about Fraser's rough draft transcription of their trial testimony (H.R. 396-397, 417-420, Vol. VI), thus permitting their testimony to be reconstructed not only in the absence of Petitioner but out of Court and secretly. This fact was not known to the State Supreme Court in any of the proceedings before it and never disclosed by

Leavy or Fraser until the hearing in the District Court. Judge Fricke testified that if he had known Fraser had seen Jones and Forbes, the matter *would* have been raised at the time of the settlement. (H.R. 871, Vol. X).

Judge Fricke testified he had *not* told Leavy he was going to produce Petitioner at the settlement and *never* had given Leavy authority to file the affidavit with the California Supreme Court in which Leavy had sworn Petitioner would be produced in Court at the time of the settlement proceedings. (H.R. 883, 887, Vol. X.)

The petition alleged that Fraser was incompetent, had a long record of arrests for being drunk, and was addicted to the excessive use of alcohol. (R. 11-12, Vol. I.) And when questioned by counsel for Petitioner, Judge Fricke testified: "I wouldn't have hesitated for a moment in revoking any proceedings that had been had up to that time if I had found out about it afterwards," referring to Fraser's alleged incompetency as a result of his chronic addiction to alcoholic beverages, and: "If I had even heard the rumor, I would certainly have gone and made an investigation to ascertain whether there was any foundation for it or justification for it." (H.R. 890, Vol. X.)

Yet both before and during the hearings Petitioner repeatedly sought to produce the arrest reports of the FBI and CII, as well as the files and arrest reports of the Los Angeles Police Department, to prove these allegations, and the District Court refused to require or permit their production and ruled them "inadmissible". (H.R. 911-912, Vol. X; R. 147, item 5, 152, item 20; see R. 162, item 4, Vol. I.) Petitioner was also foreclosed from proving by hospital records that Fraser's excessive

and chronic addiction to alcohol led to delirium tremens, hallucinations, attempted suicide and lengthy hospitalization. (See R. 153, item 21, 162, item 5, 147, item 6, 150, Vol. I.)

Every attempt by Petitioner in advance of and during the hearings to secure subpoenas for the production of, or to take the depositions of, his witnesses was denied by the Court. (R. 157, Vol. I; H.R. 552, 913-914, Vol. X; see P.T.R. 243-249, Vol. III.) The witnesses whose testimony Petitioner sought to get before the Court and the nature of the testimony will be found at R. 151-153, 160-166, 167, Vol. I; see P.T.R. 227 et seq., 243-249, Vol. III.

Mr. Davis was trying to get Fraser to identify with particularity some of the contents of the Perry notebooks and Judge Goodman told him to go to something else. (H.R. 309, Vol. VI.) Judge Goodman then used his power to shut off inquiry by putting the notes in, taking them out, and then putting them back in evidence. (H.R. 314-317, Vol. VI.) When the matter arose, Judge Goodman was immediately willing to supply speculation why two pages of the Perry notes might be missing. (H.R. 367, Vol. VI.) Mr. Davis sought to impeach Fraser on his sworn claim that the Perry notes became easier to read as he went along and Judge Goodman said: "I think the Court will be the judge of the witness," thus foreclosing impeachment. (H.R. 429, Vol. VI.) At this same point, Judge Goodman stated: "There is no such statement as that in the affidavit." But there plainly is, as reference to the affidavit shows. Judge Goodman announced "offhand" that Petitioner would be bound by every word Judge Fricke said if Petitioner called him and that Mr. Davis

wouldn't have any particular right to cross-examine, then: ". . . you can take it or leave it, the way you want." (H.R. 435, Vol. VI.)

Miss Asher was questioning Petitioner concerning his attempt and asserted right to be present at the settlement proceedings when Judge Goodman shut off the inquiry with this comment: "It doesn't make any difference whether a man wants to exercise his rights or he doesn't want to exercise them. If he has—he either has the right or he hasn't. That's all there is to it. I don't see that there is any use in wasting time on this phase of the matter." (H.R. 583-584, Vol. VII.)

Miss Asher then sought from Petitioner his testimony concerning the errors in the transcript which he contended prevented him showing he had been convicted unconstitutionally. Judge Goodman again interrupted to make the extraordinary announcement that if there were not many errors in the transcript involving constitutional issues he would allow the questions to be answered "but if there are going to be a great many of them, then I would have to say that that would be beyond the field of requirements in this habeas corpus proceeding." (H.R. 643, Vol. VIII.) The only thing, he added, "that would rise to the dignity in and of itself of having any real meaning or bearing on the question of fraud would be the question of the instructions of the judge." (H.R. 643-644, Vol. VIII.)

Judge Goodman then impatiently asked Miss Asher how much time she would need and when she replied he commented, "A lawyer's statement in that regard is not too dependable." (H.R. 644, Vol. VIII.) He told her to rush. (H.R. 645.)

As to Petitioner's continued desire, expressed by Mr. Davis, to call Judge Fricke, Judge Goodman said: "I know. I have heard that story for a long time." (H.R. 683, Vol. VIII.)

Judge Goodman sustained Respondent's objection to counsel for Petitioner questioning Judge Fricke regarding a discussion at the trial regarding the subpoenaing of witnesses on the ground it appeared in the transcript. (H.R. 839, Vol. X.) It positively does not appear. (Pet. Ex. 1: Rep. Tr. on Appeal in Crim. 5006, p. 10, Vol. 1.)

So it went. Finally, after hearing days of testimony on how Judge Fricke had ordered the preparation of the transcript by "human ingenuity," under the unsupervised direction of the prosecutor by his uncle-in-law, and without allowing any participation by Petitioner, Judge Goodman made his most remarkable comment: "Counsel, it isn't necessary for a judge to proceed with an appeal. He hasn't got anything to do with it. The litigant does that." (H.R. 855, Vol. X.)

Thus ended the hearings a bare majority of the Court of Appeals characterized as "full and fair."

REASONS FOR GRANTING THE WRIT.

[Rule 23-1(h).]

"History indicates," wrote Mr. Justice Black dissenting in *Beauharnais v. Illinois*, 343 U.S. 250, 274, "that urges to do good have led to the burning of books and even to the burning of 'witches.'"

Here these same urges have led to the publicly threatened burning of one of Petitioner's books, *Trial by Ordeal,* by a Chief Assistant to the California Attorney General; to the arbitrary seizure and holding of other of Petitioner's manuscripts, including one worth thousands of dollars, by a prison warden; to forcing pauper status upon Petitioner knowingly and deliberately, involving the enforcement of stringent orders that Petitioner must not be allowed to write a line for publication, by the director of a prison system regarded, ironically, as the most enlightened in the Nation; to a strident clamor for swift "gas chamber justice" for "this known fiend," "unconscionable monster," "legal Houdini" and "criminal genius" (Petitioner), around whose name a dark, frightening legend has been headline-woven by the press; and to widespread, ill-considered demands and editorial crusades for "reforms" which would result only as a practical matter, in leaving a wrongly and unconstitutionally convicted person remediless, and at the mercy of mob feeling and what Mr. Justice Frankfurter has aptly termed "the humorless absolutism of the moment," by emasculating the writ of habeas corpus, "this greatest of all safeguards against official oppression."

Here a quasi-legal and uncritical "moral" imperative (Petitioner *must* be executed) has been substituted for the adjudicatory process and a purely legal judgment (*is* Petitioner held in custody in violation of the United States Constitution?). Here, not only has a feeling of passion and prejudice pervaded the courtroom, but the hearing judge and the appellate judge, whose concurrence with one other swung the balance against Petitioner, have

frankly made appeals to this feeling to obtain what they, subjectively and philosophically, believe to be desirable ends: Petitioner's death and changes in the law.

In consequence, a reasoned, unwrathful and *judicial* resolution of the case, and the issues tendered by it, is of the utmost public importance, as well as being a matter of life or death to Petitioner. Certiorari, then, should be granted for the following specific reasons:

1. California law *mandatorily* requires an automatic appeal to its Supreme Court in capital cases (Calif. Pen. Code, § 1239(b)). This appeal is an "extraordinary precaution" taken by the Legislature "to safeguard the rights of those upon whom the death penalty is imposed by the trial court." (*People v. Bob,* 29 Cal.2d 321, 328.) In California, "The right of appeal to the Supreme Court is guaranteed by the constitution to the prisoner and is as sacred as the right of trial by jury." (*In re Hoge,* 48 Cal. 3, 6; see *In re Albori,* 95 Cal.App. 42, 48-49.) And "when by judicial oppression such right [of appeal] is violated or vitiated, the guaranteed substantial rights of a party have been materially affected thereby." (*Wuest v. Wuest,* 53 Cal.App.2d 339, 345.)

The Rules of the California Judicial Council declare that, in a death penalty case, the *entire* record of the trial must be prepared and certified as true and correct by the court reporter who stenographically recorded the trial proceedings. (Rules on Appeal, Rules 33(c) and 35(b).) "The Rules on Appeal have the force of law and cannot be disregarded or ignored by litigant or court." (*Kuhn v. Ferry & Hensler,* 87 Cal.App.2d 812, 815.) "[T]he pro-

cedural rules of the courts are a part of the due process of law established in this state . . . and must be observed in the interest of orderly functioning of the administration of justice." (*People v. Gilbert*, 25 Cal.2d 422, 439.) And the state's organic law commands that the California Supreme Court must review the *entire* record in a death penalty case before affirming or reversing. (Const. of Calif., Art. VI, § 4½.)

Yet here, with the death of the court reporter, the record was not and could not be prepared in accordance with any existing law or rule governing appeals and particularly this mandatory appeal. All state-established due process had to be thrown out and an *ad hoc* procedure had to be invented if a record was to be prepared at all. One was, by "human ingenuity," over Petitioner's vigorous objections. Petitioner was never allowed to defend against this transcript or to be present when it was created, settled and "approved." His motions for a hearing at which he might challenge its validity and adequacy were ignored or denied. Nevertheless, as shown, it was used as a basis for affirming the judgments of conviction imposing two sentences of death and 15 sentences to prison.

Petitioner alleged in his petition to the District Court, *inter alia*, that this procedure deprived him "of his constitutional rights and due process of law and equal protection of the law." (R. 8, 14; Vol. I.) Judge Lemmon, speaking for himself, in his unusual memorandum opinion, maintained this Court's opinion in 350 U.S. 3 marked the extreme limits of his Court's jurisdiction and hence that his Court jurisdictionally could not entertain and decide the question. This, of course, is completely incorrect. Chief

Judge Denman's answering memorandum opinion of October 28, 1956 provides a decisive reply to the contention.

Petitioner desires to add just this: This Court has squarely held that decisions in habeas corpus on prisoners in custody under state process are *not* res judicata. (*Brown v. Allen*, 344 U.S. 443, 457; see *Price v. Johnson*, 334 U.S. 266, 291.) Where the ends of justice will be served by a successive inquiry, 28 U.S.C. § 2244 specifically authorizes the judge or Court to make such an inquiry, and this Court expressly has so held (*Brown v. Allen*, supra, at 508).

Thus earlier decisions of the Court of Appeals in 205 F.2d 128 and 221 F.2d 276, dealing only with fragmented aspects of the question, were and are no *jurisdictional* bar to consideration of the question. Neither are the federal Courts bound by decisions or findings of the state Courts. This Court has, and the Court of Appeals had, the constitutional power to inquire whether the state law and state process, as construed and applied, has afforded Petitioner due process and equal protection of the law (*Hebert v. Louisiana*, 272 U.S. 312, 316; *Buchalter v. New York*, 319 U.S. 427, 429); and such an inquiry and decision cannot be foreclosed by the prior finding of the state Court; the federal Court will independently examine the facts and reach its own conclusion (*Norris v. Alabama*, 294 U.S. 587, 590; *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 659; *Niemotko v. Maryland*, 340 U.S. 268, 271). As decisively held by this Court in *Reece v. Georgia*, 350 U.S. 85:

> "We have jurisdiction to consider all the substantial federal questions determined in the earlier

stages of the litigation (citation), and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case. (Citation.)"

The Court should put the question at rest. Significantly, this is the very first opportunity the Court has had to do so for the reason that this is the very first time, after eight and one-half years of litigation, that Petitioner has succeeded in getting all the state Court records and other evidence on which the question is based before the federal Courts.

The affirmative reasons Petitioner is entitled to relief are succinctly set out in Chief Judge Denman's October 18, 1956 dissenting opinion, his November 20, 1956 dissent from denial of rehearing, and his subsequently filed memorandum opinion answering Judge Lemmon.

It should be noted (1) that Judge Goodman in the District Court did not and would not even consider the question, and (2) that actually the three judge panel of the Court of Appeals did not decide the question. Judge Lemmon, although first concurring in the bare majority opinion of Judge Hamley, then, in that later memorandum opinion of his own, emphatically denied the Appellate Court had any jurisdiction to consider the question (a matter disposed of above), and made it clear his sole concern was with getting the habeas corpus law changed to accord with his personal views of what that law should be and in the process with getting Petitioner promptly put to death.

Judge Hamley's "majority" opinion (no longer that at all with the position subsequently taken by Judge Lem-

mon) assumes, "without deciding," the question might be considered. But the opinion then avoids deciding the equal protection phase of the question with the erroneous statement: "There is here no contention that appellant was denied a right which is customarily accorded to other convicted persons. Had such a showing been made, a serious constitutional question would be presented," citing *Griffin v. Illinois*, 351 U.S. 12, 18.

But Petitioner clearly has been denied a right which is not only "customarily" but *mandatorily* accorded to other convicted condemned persons in California. In all other cases in the state heard under the automatic appeal law and governing rules there has been, *without exception*, a full appellate review upon a complete, jurisdictionally prepared and unchallenged record. In this one case—and this one only—there has been a lesser review, upon an admittedly incomplete, in effect uncertified, and challenged record, prepared by "human ingenuity," with Petitioner being given no opportunity to defend against the use of the record or having any voice in its preparation and settlement. Equal protection? Here there is neither equality nor protection. Justice (if it can be so called) cannot, under our Federal Constitution, be administered with so unequal a hand. (*Yick Wo v. Hopkins*, 118 U.S. 356; see *Dowd v. Cook*, 340 U.S. 206, 210; *Cochran v. Kansas*, 316 U.S. 255.)

Fortunately, this Court may take judicial notice of its own records (*Dimmick v. Tompkins*, 194 U.S. 540, 548). By doing so, it will find that not only did Petitioner expressly allege a denial of equal protection in the instant

petition but that he repeatedly has pressed this claim in the earlier litigation. (See, e.g., No. 239 Misc., Oct. Term, 1953, p. 19 of the petition for certiorari ["California has persisted in denying to Petitioner that type of appeal accorded all others similarly situated"], and pp. 53-64 of that record, where the complaint is there spelled out.)

Judge Hamley's opinion concedes that the record was prepared under what is there mildly termed "unusual circumstances" but asserts this "called only for the exercise of a sound discretion in adopting procedures adequate to meet the special situation." The claim that such a "sound discretion" was employed or that the procedures were "adequate to meet the special situation" is thoroughly refuted by the record.

Moreover, this Court has held that "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." (*Roller v. Holly*, 176 U.S. 398, 409.) "The law itself must save the parties' rights, and not leave them to the discretion of the courts as such." (*Louis. & Nash. R.R. v. Stock Yards Co.*, 212 U.S. 132, 144.) In determining their adjective as well as substantive law, state courts must accord the litigant due process of law. (*Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682.) And the essential elements of due process of law are notice and *adequate opportunity* to defend (*Louisville, etc. R. Co. v. Schmidt*, 177 U.S. 230, 236; *Simon v. Craft*, 182 U.S. 427, 436.) But here Petitioner was given *no* opportunity to defend against the use of the disputed transcript, although the California

Supreme Court placed the burden of proving that transcript's invalidity and inadequacies squarely upon him. (See *Saunders v. Shaw*; 244 U.S. 317, 319.)

In practical effect, Judge Hamley's opinion holds that because the state did produce, settle and use a record of sorts on appeal, rather than no record at all, Petitioner can ask and due process and equal protection may demand no more.

This is necessarily to say, under the undisputed facts of this case, that it is all right to produce a record by "human ingenuity," in contravention of all established, controlling and settled state law; to delegate, not to some impartial party, but to the prosecutor, the unsupervised authority to select a substitute reporter to prepare such a record of the trial proceedings; to let the prosecutor select his own uncle-in-law, and keep this fact carefully concealed from the trial judge, the Petitioner and the reviewing Court; to let the prosecutor and the substitute reporter consult on the transcription out of Court; to grant the substitute reporter unlimited time to prepare the record; to let him talk to detectives—key trial witnesses for the prosecution—out of Court, using these talks as a basis for reconstructing their testimony, at the suggestion of the prosecutor, and keep this fact from the trial judge, the Petitioner, and the reviewing Court; to let the substitute reporter prepare the transcript in rough draft form, the rough draft never being seen by the trial Court or Petitioner, although Petitioner formally had asked to be furnished a copy, and then, also out of Court, to permit the prosecutor to "check" the draft before it was copied in final form; to let the prosecutor swear to the

reviewing Court that Petitioner (representing himself and held at a state prison) would be produced in Court when the record was settled and never let the trial judge know of this sworn statement;[7] to pay the reporter more than three times the statutory fee for his work; to hold hearings to create and settle the record with neither Petitioner nor counsel representing him present;[8] to have Petitioner's motions to be present and challenge the transcript and the ability of the substitute reporter to transcribe the dead reporter's notes denied by the reviewing Court without prejudice and ignored by the trial Court; to proceed to have witnesses testify and settle the transcript in the absence of Petitioner; to have the trial judge "approve" such a record without testing the competence of the substitute reporter to decipher the dead reporter's shorthand notes, although the trial judge knew the local Superior Court Reporters' Association officially had gone on record that other Court reporters had examined the notes and found them to be indecipherable in material part; to have the trial judge let the prosecutor use his Court and its processes to keep Petitioner out of Court and foreclose a state Supreme Court-ordered hearing on the validity and adequacy of the record; to have this dis-

[7]The statement bordered on, if it did not actually involve, perjury. See Calif. Pen. Code, § 125: "An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false." Certainly the statement amounted to a fraud upon the California Supreme Court.

[8]Where the accused is defending himself, this Court has held that the trial judge must be particularly alert to see that the accused is not overreached and taken advantage of. (*Gibbs v. Burke*, 337 U.S. 773, 781.) But here, by not producing Petitioner or offering him counsel when the record was settled, the trial judge himself was the person responsible for Petitioner being overreached and taken advantage of.

puted record accepted by the reviewing Court and used as a basis for affirming death and other judgments, although it was not certified to be complete and correct as required, but only correct to the best of the substitute reporter's ability; and to never allow Petitioner to defend against the use of that transcript or to establish, as he claimed, that missing from it, or garbled in the transcript of it, were sections in which it should have affirmatively appeared that Petitioner had been convicted in violation of fundamental constitutional rights.

This, to say the least, is a singular definition of due process and equal protection of the law. As stated by the late Mr. Justice Jackson in a separate opinion in *Brown v. Allen*, 344 U.S. 443, 446: "But I know of no way that we can have equal justice under law except we have some law." The use of "human ingenuity," by the prosecutor, whose avowed purpose was to see Petitioner executed, is certainly no substitute for law.

2. Petitioner was deprived of an impartial determination of his appeal to the Court of Appeals by Judge Dal M. Lemmon's participation therein.

The memorandum opinion filed by Judge Lemmon after the denial of rehearing (attacking Chief Judge William Denman under the guise of answering Judge Denman's dissent from the denial of rehearing, as well as impliedly rebuking this Court for ordering the hearings through the device of terming the continued litigation of the case a "national scandal," arguing for changes in the habeas corpus law, and assuming the role of partisan and advocate of the State of California by maintaining that

Petitioner *must* be executed to erase or at least partly dim the purported "blot upon the State of California's juristic escutcheon") reveals such an extreme absence of judicial fairness, impartiality, restraint and objectivity on Judge Lemmon's part that this Court's power of supervision is called for.

Further, Judge Lemmon's statement that "Nowhere does Chessman claim that he is innocent" is *not* true.

Petitioner has consistently and vehemently maintained his innocence. Just before being sentenced to death, when asked if there was any legal cause why judgment should not be pronounced, Petitioner replied (as the records before Judge Lemmon and now before this Court show): *"The defendant is absolutely innocent of these charges."* (Pet. Ex. 1, Jacket 3: Rep. Tr. of 6-25-48.) In his affidavit seeking to disqualify Judge Goodman, Petitioner swore: *"Affiant happens to be innocent of the Red Light Bandit crimes for which he was doomed."* (R. 108, Vol. I.)

The verified exhibits attached to Petitioner's application for declaratory relief in the District Court contain this plain language by Petitioner: " . . . *that he is absolutely innocent of the so-called Red Light Bandit crimes for which he was doomed.*" (R. 181, Vol. I.) As well, reference to earlier certiorari proceedings, including those coming from the Court of Appeals, and personally prepared by Petitioner, show that Petitioner never failed to swear to and hammer at the fact he *was* innocent.[9] (See, e.g.,

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[9]Further, Petitioner has publicly stated: "Ever since my arrest I have begged for a lie-detector test on the question of guilt or innocence but I have never succeeded in being given one. . . . I want . . . to be questioned about whether I am the red light bandit. If

the third paragraph of the "Quaere" at the front of the petition and pp. 14-15 of the petition in No. 239 Misc., Oct. Term, 1953.)

In any event, guilt or innocence is not the determining legal factor, for this Court has wisely and soundly repudiated the dangerous doctrine that it may withhold the protection of constitutional safeguards merely as it may deem the litigant guilty or innocent. (*Hill v. Texas*, 316 U.S. 400, 406 ["Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous"].)

3. The record shows, as a matter of law, a personal, continuing and fixed bias on the part of Judge Goodman

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the test reveals that I am lying, when I flatly and unequivocally state I am not that bandit and that I did not commit the crimes for which I am waiting to die, then I shall abandon my legal fight for survival." (*Cell 2455, Death Row*, by Caryl Chessman [New York: Prentice-Hall, Inc., 1954], pp. 279-280.) Throughout that book and in the subsequently published *Trial by Ordeal* (New York: Prentice-Hall, Inc., 1955), read in book or magazine form by literally millions of readers in this country and throughout the Western world, Petitioner emphasized his innocence and his futile efforts to be given a polygraph examination.

In the lead article in the March, 1955 issue of *Saga* Magazine, titled "What I Would Do With My Life" and authored by Petitioner, Petitioner stated: ". . . while admittedly I had been hijacking bookies and 'knocking over' collectors for a huge bookmaking syndicate in the area, I was *not* southern California's notorious Red Light Bandit." (Pp. 10-11.)

Nor are these merely the usual claims of "bum beef" by a desperate felon. The fact is that a nationwide controversy exists over Petitioner's guilt or innocence. (See, e.g., *True* Magazine, issue of October, 1956, the documented article "The Truth About The Man in Cell 2455, Death Row" by Wenzell Brown, p. 46 ["I do not believe Caryl Chessman is guilty of the crimes for which he was sentenced to death. I am convinced that he was framed"].) Moreover since the federal Courts cannot reach the question of guilt or innocence as such, Petitioner, his counsel and others are making continuing effort to establish Petitioner's innocence independent of court action.

against Petitioner and in favor of the State of California. Petitioner was consequently denied a fair trial before a fair tribunal, which this Court has held is a basic requirement of due process. Since, measured by the standards fixed by *In re Murchinson,* 349 U.S. 133, 136, *Berger v. United States,* 255 U.S. 22, and *Knapp v. Kinsey,* 232 F. 2d 458, 466, each of the facts there held to establish a disqualifying bias and prejudice are present here in even more aggravated form, Judge Goodman should have disqualified himself on the filing by Petitioner of his affidavit under 28 U.S.C. § 144.

The record before this Court shows that the remarks of Judge Goodman, his manner of handling the trial and pretrial hearings, his prejudgment of the case, his impatience, his figuratively stepping down from the bench to become advocate for Respondent, his baseless charge of bad faith leveled at one of Petitioner's counsel, and his evident hostility to both Petitioner and his counsel foreclosed even the semblance of a fair hearing.

Here Judge Goodman was personally embroiled and exercised (cf. *Offutt v. United States,* 348 U.S. 11); here, complaining because the case was in the federal Courts and referring to his Court as a laundry, he had an announced and determined intention to repudiate Petitioner and vindicate his position. Here he declared he didn't care what this Court intended; he was going to proceed in his own way. Here the intemperate language of his earlier opinion (128 F.Supp. 600), demanding rhetorically, "What must the citizen think of our 'nickel in the slot' administration of criminal justice?" gave judicial sanction to public hysteria and prejudice. By his actions and lan-

guage, Judge Goodman committed himself to a position from which he would not or could not retreat. His personal interest in the outcome of the case from that point was necessarily and patently "substantial." (See 28 U.S.C. § 455.)

Here, when the question of the propriety of his hearing the case was raised by Petitioner's counsel, Judge Goodman immediately took up the matter of Petitioner's proposed transfer to the San Francisco County Jail pending the hearing and said without qualification that Petitioner was entitled to the order and that he would make it. Thereafter, however, he refused to do so, even when counsel for Respondent joined in making the motion.

Petitioner filed his affidavit seeking Judge Goodman's disqualification at the earliest possible and practicable time. As soon as it became apparent to Petitioner that Judge Goodman still did entertain a personal, continuing and fixed bias and prejudice against him, and it further appeared that the facts of record were sufficient to establish that bias and prejudice as a matter of law, Petitioner immediately prepared and filed his affidavit. It was ordered stricken. As noted, no counter-affidavit was filed disputing the truth or the consequences of the facts set out therein. Further, disqualification would not have interfered with the regular hearing and disposition of the case.

4. This Court surely had no intention of ordering a meaningless hearing. But, as the record shows, that was the type of hearing accorded Petitioner in the District Court and sanctioned by the bare majority opinion of the Court of Appeals. Both Courts, without warrant, harshly

limited the mandate of this Court, and, in the language of *Remmer v. United States,* 350 U.S. 377, "unduly narrow[ed the] limits of the question." (Here, as in the *Remmer* case, the hearing judge was the Hon. Louis E. Goodman.) In this connection, it should be emphasized that this Court's opinion ordering the hearings makes specific reference to the "fraudulent transcript" as well as to fraud and collusion on the part of state agents.

Judge Hamley's October 18, 1956 opinion declares that Petitioner does not directly challenge the District Court's findings. In a fundamental, words-mean-what-they-say sense, Petitioner *does* directly challenge those findings; he attacks them *as a whole,* rather than piecemeal, for the reason that the hearing itself was so emasculated it furnished no valid or legal basis for the findings.

For example, Judge Goodman eulogistically found that "Fraser was exceptionally and specially competent to transcribe Perry's notes and did so with fairness and competently"—yet Judge Goodman had refused to permit Fraser's ability or the accuracy of the transcript to be tested, *whether this Court wanted it done or not,* and repeatedly held, "That is not an issue in this case," and Fraser "could have been the most incompetent reporter in the world and he could have made a mess of the transcript . . . and that does not raise any federal question."

Judge Goodman also found it was "not true that Fraser had been discharged at any time from his position as official Court reporter of Los Angeles County because of incompetency or drunkenness or for any other cause"—but Judge Goodman, at the same time, refused to arrange for the production of Los Angeles Superior Court Judge

Alfred E. Paonessa, by whom Petitioner offered to prove the contrary.

Judge Goodman further sweepingly found it was not true "that Fraser was inebriated or drunk or under the influence of alcohol or mentally or morally incapable of such work, at any of the times he was engaged in the work of transcribing Perry's notes"—although Judge Goodman had refused to permit the FBI and CII files, which showed Fraser's long arrest record for being drunk and *one arrest while he was supposedly actually engaged in preparing the record,* to be produced. Neither would Judge Goodman arrange for the arrest reports and logs of the Los Angeles Police Department (which had been secreted and kept from Petitioner's investigator) to be produced, although Petitioner was prepared to prove by them and the officers signing the reports that Fraser was repeatedly drunk during this period. Nor would Judge Goodman arrange for the production of Mrs. Eva Hoffman, by whom Petitioner offered to prove that at the very time Fraser was engaged in working on the transcript, he was so intoxicated as to be mentally and physically incapable of doing such work with any degree of competence. Judge Goodman refused as well to order the production of hospital records which would have revealed Fraser had a long and chronic addiction to alcohol, with inevitable brain damage, and which addiction culminated in 1953 in an attempt at suicide, severe delirium tremens, hallucinations the Mafia was after him, and lengthy hospitalization.

Judge Goodman additionally found that the deceased "Shorthand reporter Perry was not unable to properly record the trial proceedings . . ." This finding flies di-

rectly in the face of the letter from the Chairman of the Executive Committee of the Los Angeles Superior Court Reporters' Association: "Other reporters of our number have examined and studied Mr. Perry's notes and have reached the conclusion that many portions of the same will be found completely indecipherable because, toward the latter part of each Court session, Mr. Perry's notes show his illness." Nor would Judge Goodman arrange for the production of these named reporters, including the author of the letter.

Judge Goodman as well found that "The [disputed] instructions given by the trial judge on May 21, 1948 were correctly and accurately reported in the transcript as prepared by Fraser." But the only allowed direct testimony on these instructions *as transcribed from the notes* came from Respondent's own expert witness, who testified Perry's notes on these disputed instructions were "shattered" and that he could *not* read them. (Significantly, he also testified other portions of the notes were "skeletonized," "shattered" and "shattered clear out of recognition.") Judge Goodman refused to order or arrange for the production of named witnesses, including trial jurors (other than the two produced by Respondent), to establish that the prejudicial instruction was given and the comment made.

Petitioner could extend this showing for pages. He lost his case only because he was not allowed to present his proof. Judge Goodman's findings acquitting Leavy and Fraser of any connivance or collusion completely ignore the evidence they kept concealed the fact that Fraser was the uncle-in-law of Leavy; that if Judge Fricke had known that Fraser had talked with Detectives Forbes and Jones

out of Court, at the suggestion of Leavy, to reconstruct their testimony as prosecution witnesses at the trial, he would have raised the matter at the settlement, and also that if he had even heard the rumor of Fraser's alleged incompetence as a result of drunkenness he "would certainly have gone and made an investigation," etc.

Judge Goodman led Petitioner to believe that all the evidence he considered material would be produced, with or without specific statutory authority; he also assured counsel for Petitioner that all process for the production of witnesses would be afforded. (P.T.R. 20, Vol. II.) Yet a study of the record shows that the only witness, in addition to Leavy, Fraser and Judge Fricke, that Judge Goodman desired to hear was Judge Neeley (who, on learning he was to be called, suddenly remembered nothing: Resp. Ex. I for ident.), and it was he and he only whose production the Court offered to secure. (H.R. 525, Vol. VII.)

Every attempt by Petitioner in advance of and during the hearings to secure subpoenas for the production of, or to take the depositions of, his witnesses was denied by Judge Goodman. (R. 157, Vol. I; H.R. 552, Vol. VII, 913-914, Vol. X; see P.T.R. 243-249, Vol. III.) On December 30, 1955 Petitioner's counsel even raised the possibility of moving the place of hearing to Los Angeles if no other way was open to secure vital testimonial evidence (P.T.R. 209 et seq., Vol. III), and Judge Gooodman kept the matter hanging by stating: "I think there is some provision in the statute for bringing [in] witnesses from outside the district," but did not identify the provision. Again on January 9, 1956 Petitioner's counsel argued at length for the issuance of Court-ordered subpoenas. (P.T.R. 242-252, Vol. III.) On that same date Petitioner filed his "Pe-

titioner's Witness List and Application for Court Ordered Issuance of Subpoenas". (R. 151-153, Vol. I.) This application was denied without prejudice. (R. 157, Vol. I.)

Having made every effort prior to the hearings for process or arrangement to produce his witnesses and failing, Petitioner filed his "Motion for Order for Issuance of Subpoenas or Process for the Taking of Deposition..." on January 19, 1956 (R. 167, Vol. I), with supporting affidavit. (R. 160-166, Vol. I.) This motion, too, was denied (R. 215, Vol. I; H.R. 511, Vol. VII.) On January 24, 1956 Petitioner filed his motion for declaration of rights (R. 168-169, Vol. I), with supporting exhibits (R. 170-197) and affidavits (R. 198-203), by which he sought, among other things, to be able to pay the costs of producing his witnesses. (R. 201-202.) The application was summarily denied. (H.R. 916, Vol. X.)

This was a strange way of doing justice.

Further, here, as in *Adams v. United States*, 317 U.S. 269, Petitioner was denied the time and facilities for investigation and for the production of evidence; here, as there, it should be held that "evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in Court."

Judge Hamley's opinion does not dispute that, at the prison prior to the hearings, all of Petitioner's legal papers were examined and their contents ascertained, or that Petitioner's person and effects were searched daily, often more than once, or that conversations between Petitioner and his counsel were listened to, or that all of the needless harassment and provocation which Petitioner and

his counsel were subjected, as detailed in the uncontradicted affidavits, is not true, or that Judge Goodman did not first state flatly he would change Petitioner's custody and then thereafter, even when counsel for Respondent joined in the motion for transfer of custody, refuse to grant the motion or enforce his *one* corrective order.

Powell v. Alabama, 287 U.S. 45, is, of course, the landmark case for the proposition that the right to be heard comprehends the right to the aid of counsel, the right to the *effective* aid of counsel, and the right to adequate time and opportunity to prepare. Both time *and* opportunity are demanded. (*Adams v. United States*, supra.) The issue cannot be settled by a mere reference to calendar days.

The condemned actions of Respondent's agents, state agents, in examining Petitioner's legal papers, and in being within hearing range during conferences between Petitioner and his counsel are, in legal contemplation, precisely the same as those which caused a reversal in *Coplon v. United States* (App. D.C.), 191 F. 2d 749, where it was recognized that there is no effective aid of counsel without private consultation. Refusal by the Respondent to provide adequate accommodations and reasonable conditions cannot override constitutional requirements.

Judge Goodman's attitude toward the case is again pointed up in his allowing J. Miller Leavy to appear—and actively and even at times theatrically participate—as one of the counsel for Respondent over the vigorous objections of counsel for Petitioner. That appearance served no useful purpose; it wrongly operated to keep Leavy from being excluded when other witnesses testified, particularly Stanley Fraser. The appearance was readily and wrongly

permitted even though Judge Goodman had full and prior knowledge Leavy was charged with fraud while acting as a state agent and that he would be a material witness at the hearing.

The prejudicial consequences of Judge Goodman's denial of Petitioner's motion to make the State of California a respondent is shown in the statement of facts. The Court of Appeals is in error in holding "that the state may not be joined as a party in [a habeas corpus] proceedings." In the past, in this case, in habeas corpus proceedings in the District Court, the Court of Appeals and this Court, such a joinder has been repeatedly sanctioned (see, e.g., 205 F. 2d 128, 340 U.S. 840, 341 U.S. 929, 346 U.S. 916).

The state *was* and is the real party in interest. Habeas corpus is *not* a suit against the state (*U. S. ex rel., Elliott v. Hendricks*, 213 F.2d 922). To have joined the state as a respondent, then, would not have made it a party to a *suit* in any legal sense of that word. It simply would have made it—and hence its officers and agents—a party to the proceeding, according judicial recognition to its actual real party in interest status.

The Court of Appeals holds that the District Court did not abuse its discretion in denying Petitioner's motion under 28 U.S.C. § 2250 to order the shorthand notes—a crucial part of the record, and offered in evidence at the first opportunity—photostated and furnished without cost to Petitioner, who was proceeding in forma pauperis. But the District Court, as the record shows, *refused* to exercise its discretion one way or the other, holding the section did not empower it to make such an order. The section, however, unmistakably does permit such an order, and

Petitioner was materially hampered in preparing his case by not having the notes.

The notes were impounded on December 16. The hearings were then scheduled to begin January 9. Petitioner's expert, as soon as they were available, began to study them. They were available only *at* the clerk's office and *when* that office was open, which gave Petitioner's expert only some 15 days in which to work, excluding week ends and the holidays. Petitioner had only a limited amount of funds. If he had paid the $300 to $400 required to have the notes photostated he would have been unable to pay his expert. As it was, his funds were soon exhausted and he was compelled to proceed in forma pauperis. As well, Petitioner was running out of time. His expert was not able to complete his study of the notes, around which the entire proceeding centered, unless they were available at nights and on week ends. (See P.T.R. 262-263, Vol. III.) They never were. In contrast, the state was able to pay its expert handsomely. And note that, even with a more than two week head start and under the most favorable conditions, that expert testified he "had to do something desperate" to complete his check of the notes against the transcript. He worked from December through January 8th, including Saturdays and Sundays, "right straight through." (H.R. 738-739, 744, Vol. IX.)

5. It is a curious situation when the Respondent here, a state agent, can arbitrarily keep Petitioner from property that belongs to him and thus prevent him from financing a Court fight to prove that other state agents are guilty of fraud. Indeed, the very purpose of Respondent's seizure of Petitioner's literary property was to force pauper status upon Petitioner through the use (and clear

abuse) of Respondent's naked power, and in this Respondent was entirely successful. Unless the age of the Police State is already with us, the public importance of resolving the issues tendered by Petitioner's application for declaratory relief could scarcely be more manifest. This is an instance where avoidance of the constitutional questions amounts to evasion (cf. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 75).

The District Court was clearly wrong in holding that it was without jurisdiction to declare Petitioner's rights. The language of 28 U.S.C. § 2201 expressly empowers "any Court of the United States . . . in a case of actual controversy within its jurisdiction . . . [to] declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought . . ." The section makes no exception of habeas corpus proceedings (and here, in that proceeding, the "actual controversy" was and is whether the death and other assailed judgments imposed by the California Courts are void or valid under the Federal Constitution). Neither does Rule 57, F.R.C.P., make such an exception, nor any case Petitioner has been able to find. Quite the contrary.[10]

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[10]See Moore, *Commentary on the U.S. Judicial Code* (Matthew Bender & Co., 1949), p. 59, including footnotes 69-72 ["The declaratory judgment procedure operates like an 'expanded bill quia timet, meant to do in general what that suit did in its limited field.' In other words, by the creation of the new writ the area of adjudication is extended to cover any civil matter raising a justiciable case of controversy over which the federal courts have jurisdiction . . ."] In the federal courts, habeas corpus is a civil writ, *Ex parte Tom Tong*, 108 U.S. 556; *Cross v. Burke*, 146 U.S. 82; *Fisher ex rel. Barcelon v. Baker*, 203 U.S. 174. Here the District Court had Petitioner in its custody and possessed undoubted jurisdiction over the subject matter both as to the merits and the sought declaration of rights.

What the Court of Appeals, as well as the District Court, failed entirely to apprehend is that Petitioner did *not* seek declaratory relief under 28 U.S.C. § 2243 (the habeas corpus section). Rather, declaratory relief was expressly sought under 28 U.S.C. §§ 2201 and 2202 (the declaratory judgments sections). The latter application was simply ancillary to the former proceedings, and the general policy of the Courts, especially under the Federal Rules of Civil Procedure, has always favored a settlement of disputes between the same parties, concerning the same general subject matter, in one action.

Further, a favorable declaration of rights would not overturn any valid "security regulations" at the prison. Petitioner so alleged in his petition for habeas corpus to the California Supreme Court, summarily denied, and made a part of his application by being filed as a supporting exhibit. (R. 184, Vol. I.) Moreover, this is a question of fact on which Petitioner is entitled to a hearing. (See 28 U.S.C. § 2202.)

The California Supreme Court denied without opinion or hearing a petition for habeas corpus, seeking the same relief as was subsequently sought in the application for declaratory relief in the District Court. (R. 174-193, Vol. I.) Petitioner has no further remedy in the state Courts. He is civilly dead (California Penal Code, § 2602), and so is barred from instituting a civil suit in the Courts of California.

But there is no comparable provision for civil death in the federal statutes. Petitioner is resultantly free to obtain whatever relief to which he may be entitled under federal law and the Fourteenth Amendment in the federal Courts. What is ultimately in issue is whether the *acts*

of the Respondent warden in arbitrarily seizing and holding Petitioner's literary property and refusing to allow Petitioner to use the products of his mind to defray the costs of litigation and compensate counsel operate to deprive Petitioner of his property without due process of law and deny him the effective assistance of counsel. Significantly, Respondent does not claim the manuscripts held are not Petitioner's or that Respondent has any right to them or property right in them; Respondent, rather, simply used his power to seize them and then signified his intention to hold them until Petitioner was executed.

Federal Courts, fortunately, have both the clear power and duty to strike down state prison rules or conduct which, in their application to a state prisoner, seeking relief in the federal Courts, operate to deprive the prisoner of due process or equal protection of the law. (*Ex parte Hull*, 312 U.S. 546.)

Petitioner does have an enforceable legal right to his literary property as well as an enforceable legal right to use the products of his mind for the purposes stated. While Petitioner is civilly dead under state law, he expressly retains the right to "mak[e] and acknowledg[e] a sale or conveyance of property." (California Penal Code, § 2603.) Further, in this state, "No conviction of a crime works any forfeiture of any property . . ." (California Penal Code, § 2604.) And the Fourteenth Amendment commands that no state shall deprive any citizen of his property without due process of law, and here there has been no due process whatever but only a process involving the arbitrary employment by Respondent of his naked power.

CONCLUSION AND PRAYER FOR WRIT.

Petitioner respectfully submits the Court should hold: (1) that Petitioner was constitutionally entitled to be personally present and allowed to participate in the Los Angeles Superior Court proceedings and trial at which the uniquely made-up reporter's transcript of the trial on the merits was created, settled and approved for use on the mandatory appeal; (2) that the state trial Court's order approving this challenged record must be set aside, as well as the California Supreme Court's affirmance of the judgments of conviction based upon it, and that a new determination of its validity and adequacy must be held in the Los Angeles Superior Court, with Petitioner allowed to participate therein personally and effectively; (3) that the findings of the District Court (because of the manner in which the truncated hearing was conducted and the demeanor of the judge before whom the hearing was held) are not determinative of the issue of fraud, and hence that that issue too should be resolved in the new Superior Court proceeding; (4) that, similarly, the holdings of the Court of Appeals (because of the position taken by the concurring judge in the bare majority opinion) are not controlling to any degree or in any respect upon the Superior Court proceeding; (5) that the District Court did have jurisdiction to entertain the application for declaratory relief under 28 U.S.C. §§ 2201 and 2202, and that if Petitioner sustains his allegations as set out in the application and supporting papers, he is constitutionally entitled to the relief there prayed for: that is, release of his unpublished novel and the right to use the products of his mind to defray the costs of litigation and to compensate counsel.

In this way, once and for all, the case may be resolved decisively and fairly.

To make a decision possible at this term of the Court and still give the Court ample time to deliberate, Petitioner and his counsel here stipulate that this petition may be treated as the brief for Petitioner normally filed following the granting of certiorari, and that the case may be decided upon it, respondent's brief in opposition and an answering brief by Petitioner, using the typewritten record. Counsel for Petitioner are prepared to argue the case immediately.

Wherefore, Petitioner prays that a writ of certiorari issue to the Court of Appeals for the Ninth Circuit in No. 15092, and that this Court reverse the judgment of the Court of Appeals with appropriate directions.

Dated, January 24, 1957.

Respectfully submitted,

GEORGE T. DAVIS,
Attorney for Petitioner.

CARYL CHESSMAN,
Petitioner pro se.

ROSALIE S. ASHER,
Of Counsel.

(Appendix Follows.)

Appendix

United States Court of Appeals
For the Ninth Circuit

CARYL CHESSMAN, *Appellant,* vs. HARLEY O. TEETS, Warden, California State Prison, San Quentin, California, *Appellee.*	No. 15,092 Oct. 18, 1956

Appeal from the United States District Court
for the Northern District of California,
Southern Division

Before: Denman, Chief Judge, and Lemmon and Hamley, Circuit Judges.

HAMLEY, Circuit Judge:

This is an appeal from an order denying Caryl Chessman's eleventh application for a writ of habeas corpus.

He was convicted on May 21, 1948, of seventeen felonies.[1] Two sentences of death and fifteen sentences of imprisonment were entered on June 25, 1948. Following denial of his motion for a new trial, Chessman appealed to the California supreme court.

While this appeal was pending, appellant instituted several proceedings challenging the accuracy and completeness of the transcript on appeal and the validity of the proceedings in which

[1]Auto theft, armed robbery, kidnaping for the purpose of robbery with infliction of bodily harm, attempted rape, and forcible acts of sexual perversion. On two of the convictions, the jury found that Chessman should suffer the death penalty.

it had been settled.[2] Most of these proceedings revolved around the fact that, after the trial, the court reporter died before completing his transcript of the testimony. The transcript was completed by another court reporter, and certified after a hearing which appellant was not permitted to attend.

For the most part, appellant was unsuccessful in these early efforts to invalidate or augment the transcript. He did, however, obtain inclusion in the transcript of the voir dire examination of the jurors and the opening statement of the prosecuting attorney. *People v. Chessman,* 35 Cal. (2d) 455, 218 P. (2d) 769, cert. denied 340 U. S. 840, 95 L. Ed. 616, 71 S. Ct. 29.

The judgments and order were affirmed on the merits by the California supreme court on December 18, 1951. *People v. Chessman,* 38 Cal. (2d) 166, 238 P. (2d) 1001, cert. denied 343 U.S. 915, 96 L. Ed. 1330, 72 S. Ct. 650, pet. rehearing denied 343 U. S. 937, 96 L. Ed. 1344, 72 S. Ct. 773.

Since affirmance and prior to the filing of the instant application, Chessman unsuccessfully prosecuted several proceedings in state and federal courts in an effort to obtain release from custody, or to gain a new trial.[3] Execution has several times been stayed to enable Chessman to pursue these remedies.

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[2]Writ of prohibition denied. **Chessman v. Superior Court,** Crim. 4950 (Minute entry, California Supreme Court) November 22, 1948. Writ of habeas corpus denied by district court on March 17, 1950, and application for certificate of probable cause denied by a judge of this court on May 8, 1950. Writ of habeas corpus denied. **Chessman v. Calif. & Duffy,** Crim. 5110 (Minute entry, California Supreme Court) June 12, 1950. Motion to augment, correct, and properly certify the record granted in part and denied in part. **People v. Chessman,** 35 Cal. (2d) 455, 218 P. (2d) 769 (cert. denied, 340 U. S. 840, 95 L. Ed. 616, 71 S. Ct. 29), decided May 19, 1950. Writ of habeas corpus denied by district court on December 4, 1950, and application for certificate of probable cause denied by a judge of this court on March 10, 1951. **Chessman v. Duffy,** Misc. 202 (cert. denied, 341 U. S. 929, 95 L. Ed. 1359, 71 S. Ct. 800). Miscellaneous motions denied. **Chessman v. California and Duffy,** Crim. 5217 (Minute entry, California Supreme Court), decided January 15, 1952. Writ of habeas corpus denied by district court on November 6, 1951. **Chessman v. Duffy** (D. C. Civ. 30965).

[3]**Chessman v. People,** 205 F. (2d) 128 (9th Cir. 1953), cert. denied 346 U. S. 916, 98 L. Ed. 412, 74 S. Ct. 278; **Chessman v. Teets,** Crim. 5632 (Minute entry, California Supreme Court) July 21, 1954; **People v. Superiod Court,** 273 P. (2d) 936 (Cal. A.); **In re Chessman,** 43 Cal. (2d) 391, 408, 274 P. (2d) 645, cert. denied 348 U. S. 864, 99 L. Ed. 681, 75 S. Ct. 85; **In re Chessman,** 44 Cal. (2d) 1, 279 P. (2d) 24.

The application for a writ of habeas corpus now before us was filed on December 30, 1954.[4] In it, Chessman alleged that the transcript on appeal had been fraudulently prepared, as a result of which erroneous and prejudicial instructions and comments to the jury had been omitted from the transcript. He also alleged that he had not been afforded effective representation of counsel in the matter of settling the transcript, and had been deprived of the right to be present at the hearing on the settlement of the transcript.[5]

On January 4, 1955, the district court, without a hearing, summarily denied the application as repetitious and completely without merit. *In re Chessman*, 128 F. Supp. 600. A certificate of probable cause was obtained from a judge of this court. *In re Chessman*, 219 F. (2d) 162. On appeal, however, we affirmed. *Chessman v. Teets*, 221 F. (2d) 276. The United States Supreme Court granted certiorari, reversed the judgment, and remanded the case to the district court for a hearing.[6]

Pursuant to the mandate of the Supreme Court, a writ of habeas corpus was issued on November 30, 1955, returnable on December 8, 1955. On the latter date, the case was set for trial on January 9, 1956, but was later continued to January 16, 1956. The hearing consumed seven and a fraction days, and was concluded on January 25, 1956.

On January 31, 1956, an opinion, findings of fact, and conclusions of law were entered, to the effect that appellant had failed

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[4]This application was filed shortly after the U. S. Supreme Court had denied certiorari to the supreme court of California "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court." **Chessman v. Teets**, 348 U. S. 864, 99 L. Ed. 681, 75 S. Ct. 85.

[5]A fourth ground set out in this application—that he had been deprived of effective representation by counsel prior to and throughout the trial—was not urged at the hearing or on this appeal.

[6]**Chessman v. Teets**, 350 U. S. 3, 100 L. Ed. 2, 76 S. Ct. 34. Observing that, on the record, there was no denial of appellant's allegations as to fraud, the Supreme Court said:

> ". . . The charges of fraud as such set forth a denial of due process of law in violation of the Fourteenth Amendment. See **Mooney v. Holohan**, 294 U. S. 103. Without intimating any opinion regarding the validity of the claim, we hold that in the circumstances disclosed by the record before us the application should not have been summarily dismissed. . . ." (pp. 3, 4)

to sustain the allegations of his application. Judgment discharging the writ was accordingly entered on that day. *Chessman v. Teets*, 138 F. Supp. 761. An application for a certificate of probable cause was granted by a judge of this court, thereby sanctioning this appeal.

The only allegation of the application regarding which the Supreme Court, in reversing and remanding, indicated concern was that which charged that the transcript on appeal had been fraudulently prepared. The district court found that there was no factual basis for this allegation. It affirmatively found that the substitute reporter was exceptionally and especially competent to transcribe the deceased reporter's notes; that he did so with fairness and competency; and that a fair and correct record was certified. It also found that no erroneous instructions or comments had been omitted from the transcript, as no such instructions had been given or comments made.

On appeal, Chessman does not directly challenge any of these findings. He contends, however, that in the proceedings under review, the district court denied him "that type of full and fair hearing ordered by the Supreme Court."

In support of this contention, appellant advances seven specific objections as to the conduct of the habeas corpus hearing. The first of these is that the trial court erroneously refused to permit the taking of depositions of material witnesses, or to order their production.

The persons whom appellant desired to subpoena, or to have their deposition taken, reside in the Los Angeles area. Hence, the trial court, which is the district court for the Northern District of California, Southern Division, was without authority to subpoena these persons to appear at the trial.[7]

No order was required to enable appellant to take the depositions of the named Los Angeles residents.[8]

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[7]Fed. Rules Civ. Proc., Rule 45(e)(1), 28 U.S.C.A. **Vincennes Steel Corp. v. Miller**, 94 F. (2d) 347. Counsel for appellant, during the argument of the motion, told the trial court: "We are of course aware of the fact that the process of this court by subpoena does not extend beyond a hundred miles and that we cannot bring them here under subpoena."

[8]28 U.S.C.A. §2246; Fed. Rules Civ. Proc., Rule 26, 28 U.S.C.A.

On January 19, after the trial had been in progress four days, appellant moved for a two-week continuance, so that the depositions of eleven Los Angeles residents could be taken. The affidavit supporting this motion outlined the character of the testimony which each of these witnesses would give.[9] On January 24, 1956, one day before the close of the trial, appellant moved for a two-week continuance. He desired the continuance so that he might endeavor to arrange for the appearance of some of the Los Angeles witnesses, or find additional witnesses. These motions were denied.

Some of the proffered testimony was patently hearsay, some was cumulative, and some was of doubtful relevancy. No sufficient showing was made as to why any admissible and necessary testimony could not have been obtained by deposition prior to the trial. Appellant was aided by counsel throughout, and had from November 30, 1955, to January 16, 1956, to prepare his case. Despite the denial of these motions, appellant produced seven witnesses and offered twenty-two exhibits, twenty of which were received in evidence.

We hold that the trial court did not abuse its discretion in denying these motions for a continuance made during the course of the trial.[10]

Concerning the conduct of the habeas corpus hearing, appellant next argues that the district court deprived him of a full and fair hearing by too narrowly restricting, or excluding, the evidence which he sought to produce. Four instances are relied upon in support of this contention:

First. The first such instance has to do with the question of whether the notes of the deceased court reporter were decipher-

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[9]Two of them would testify that they were present in the courtroom at the original trial and heard the judge give the instruction and make the comment which appellant states were omitted from the transcript. Three (including one who would be asked to bring hospital records) would give testimony bearing upon the character and fitness of the substitute reporter. Four would testify, as court reporters, that the deceased reporter's notes were not decipherable. One would testify that the trial judge told him that appellant would be brought to court when the transcript was settled. One would be asked to bring microfilmed copies of the records in connection with the negotiations for the services of the substitute reporter.

[10]See **U. S. v. Pacific Fruit & Produce Co.**, 238 F. (2d) 367.

able with a reasonable degree of accuracy. Appellant calls attention to some general statements of the court to the effect that it would not undertake to test the ability of the substitute reporter, or the accuracy of the questioned transcript.

General statements of this kind, unassociated with specific rulings excluding proffered evidence, present no question for review.

The only specific exclusion of testimony to which appellant calls attention relates to the court's refusal to require the substitute reporter to transcribe, from the witness stand, a particular page of the deceased reporter's notes. The witness stated that, because of the intervening years since he worked on the matter, he would need time to study the notes before attempting a transcription.

The court offered to have the witness do this overnight, or in an adjoining room while the trial was in progress. These were reasonable alternatives to appellant's proposal. Appellant rejected the suggestion for overnight study, and failed to avail himself of the suggestion that the study be made in an adjoining room. It follows that appellant is now in no position to complain because such a test was not made.

Second. Counsel for appellant asked the deputy district attorney who tried the original case whether the trial judge had told the witness that the transcript would be delivered to Chessman "in court." Objection to the question was sustained on the ground that it was immaterial.

The sustaining of this objection, if erroneous, was not prejudicial. Counsel for appellant got his answer to the question later in the trial, when the same witness testified that he had no recollection of such a statement by the trial judge. Still later in the trial, the trial judge testified that he had not made such a statement to the deputy district attorney.

Third. In the application for a writ of habeas corpus, it is alleged that the asserted fraud in preparing and certifying the transcript resulted in the omission of an erroneous instruction and an improper comment to the jury. Appellant now argues that, at the habeas corpus hearing, the court improperly limited to these two matters the testimony as to omissions and inaccuracies.

The court did make a general statement to the effect that the only omissions to be considered were those alleged in the application. Actually, however, the testimony was not so limited. Appellant was permitted to testify as to numerous other asserted omissions and inaccuracies. In any event, the objection here raised presents nothing for our consideration, since appellant refers to no specific instance in which testimony of this character was offered and rejected. We do not reach the question of whether the court's general statement correctly defined the scope of admissible testimony.

Fourth. It was appellant's contention throughout that the substitute reporter had misrepresented his ability to transcribe the notes of the deceased reporter. This contention was based upon the allegation that, because of long-continued excessive use of alcoholic beverages, the substitute reporter was mentally and physically incompetent to transcribe the notes.

In order to prove this allegation, appellant, on January 9, 1956, applied for an order requiring the immediate production of the records of the Los Angeles police department pertaining to the substitute reporter and the latter's wife. In the same application, an order was requested requiring the supervisor of records of the Los Angeles County General Hospital to produce hospital records covering the substitute reporter's alleged hospitalization in August, 1953, for delirium tremens and attempted suicide. Similar requests were made in appellant's witness list and application for an order authorizing issuance of subpoenas, filed the same day.

On January 24, 1956, the day before the end of the habeas corpus hearing, counsel for appellant orally moved for an order requiring that Federal Bureau of Investigation file No. 4146311 and California Criminal Identification file No. 559845 be produced and made a part of the record. It was stated to the court that these files related to the arrest record of the substitute reporter. All of these applications and motions were denied.

The arrest records, as distinguished from conviction records, would not be competent evidence of intoxication. This is likewise true of the F. B. I. and C. C. I. records. The hospital records pertaining to an illness in August, 1953, would not be relevant on the question of the substitute reporter's fitness in the last six months of 1950, when he prepared the transcript in question. In

most, if not all, cases, the custodians of these documents resided in Los Angeles. The court had no authority to order the custodians to produce these records in San Francisco. *Merchant Bank of N. Y. v. Grove Silk Co.*, 11 F. R. D. 439.

This was not an application for an order requiring a party to the action to produce documents.[11] If the purpose was to discover evidence, no court order was necessary, unless required to fix a convenient place of examination.[12]

For the reasons indicated, the court did not err in denying these applications and requests.

Upon consideration of the four specific instances which appellant presents, and which have just been discussed, we conclude that the court did not deprive appellant of a full and fair hearing by too narrowly restricting, or excluding, the evidence which he sought to produce.

Returning to the general question of whether the district court denied appellant the kind of hearing ordered by the Supreme Court, appellant next argues that he was not allowed adequate time and opportunity to prepare for the hearing. He refers specifically to the lack of privacy and the time and place restrictions imposed by prison officials, which interfered with conferences with his counsel and investigator.

It would not be practicable to here recount all of the charges appellant made in various uncontroverted affidavits, and repeated in his briefs here, concerning these matters. There is no doubt that his incarceration in San Quentin prison, under sentence of death, made it difficult for appellant to enjoy very much freedom and privacy in connection with these consultations. Some of the prison regulations which brought about this result may have been unnecessary and unreasonable. Upon application prior to the trial, the court entered one or more corrective orders, which brought a measure of improvement.

The application for this writ of habeas corpus was filed on December 30, 1954. It is to be assumed that appellant then had in mind the proof which was available to prove his allegations of fraud. On November 30, 1955, when the mandate from the Supreme Court ordering a hearing was filed, counsel for appel-

[11]See Fed. Rules Civ. Proc., Rule 34, 28 U.S.C.A.

[12]Fed. Rules Civ. Proc., Rule 45(d), 28 U.S.C.A.

lant demanded an early hearing.[13] He had forty-seven more days in which to prepare before the matter came to trial on January 16, 1956.

We are not persuaded, on this record, that appellant's opportunity to prepare was so unnecessarily and unreasonably curtailed or interfered with as to deprive him of a full and fair hearing.

The deputy district attorney who tried the original case appeared as one of the counsel for appellee in the instant habeas corpus hearing. Appellant asserts that the trial judge abused its discretion in permitting this to be done.

At the outset of the hearing, appellant resisted a motion that this deputy district attorney be admitted to practice before the court so that he could participate as counsel in the case. The objection was properly rejected, and the motion correctly granted. The fact that this deputy district attorney participated in the original trial in no sense disqualified him from participating as counsel in the habeas corpus hearing.

Appellant cannot complain because this attorney was later permitted to testify, since it was appellant who called him to the stand. After this attorney appeared as a witness, he was not required to withdraw from further participation as counsel, since he had not taken the stand as a witness for his client.[14]

In any event, the fact that the deputy district attorney in question participated as counsel, after testifying as a witness, would not bear upon his competency as a witness. It would bear only upon his credibility. *Bogart v. Brazee*, 331 Ill. 160, 162 N. E. 877. The credibility of witnesses is not in issue on this appeal. The participation of this attorney (he examined one witness but did not take part in the oral argument) did not deprive appellant of a full and fair hearing.

Appellant next contends that he was denied a full and fair hearing because his motion to make the state of California a party respondent was denied.

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[13]Counsel stated: ". . . I must respectfully resist any dilatory tactics or any attempted delays for unnecessary purposes in this case. Mr. Chessman has been in jail seven years. We are ready to proceed; we are—we want action."

[14]See Canon 19, Canons of Professional Ethics, adopted by the American Bar Association: 62 Reports of American Bar Association (1937) 1105, 1112.

Appellant's purpose in making this motion was to place the deputy district attorney and trial judge who participated in the original hearing and the substitute reporter in the position of officers of an adverse party, subject to impeachment when called by him as witnesses.[15]

A party to an action is one who seeks relief, or against whom relief is sought.[16] When one who is held in custody pursuant to the judgment of a state court seeks a writ of habeas corpus, he asserts a right to relief against his custodian, and not against the state. *Ex rel. Elliott v. Hendricks*, 213 F. (2d) 922. Nor can the state assert a right to relief against such a petitioner.

It follows that the state may not be joined as a party in such a proceeding.[17] We find no merit in the contention that the state of California should have been joined as a party.[18]

The court denied appellant's motion, made on January 9, 1956, that the clerk be ordered to supply appellant with a free photostatic copy of the shorthand notes of the deceased reporter. Appellant argues that this could have been done under 28 U.S.C.A. §2250, and that the denial of his motion marked an abuse of discretion which deprived him of a full and fair hearing.

The statute in question requires the clerk to supply "certified copies" of certain documents "as may be required by order of the judge." What, if any, certified copies should be supplied rests within the sound discretion of the judge.

The notes were made available to appellant, in the office of the clerk, from December 16, 1955, until the day of the trial. This was a more favorable arrangement than that to which appellant had originally agreed. The motion to require the free photostatic copy was not made until one week before the trial. Assuming, without deciding, that these stenographic notes are the kind of documents or records referred to in the statute, we find no abuse of discretion in the denial of this motion.

The final argument advanced in support of appellant's assertion that he was denied a full and fair habeas corpus hearing relates

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[15]See Fed. Rules Civ. Proc., Rule 43(b), 28 U.S.C.A.

[16]Fed. Rules Civ. Proc., Rules 19, 20, 28 U.S.C.A.

[17]Footnote 16.

[18]It may be further noted that appellant points to no instance in the record wherein he was precluded from presenting impeaching evidence.

to the alleged personal bias and prejudice of the judge, Honorable Louis E. Goodman.

On November 30, 1955, when the remanded habeas corpus proceeding first came before Judge Goodman, counsel for appellant suggested that the judge voluntarily disqualify himself. Judge Goodman declined to do so. Later the same day, counsel for appellant advised the court that, after discussing the matter with his client, he desired to say nothing more on the question of disqualification.

Thereafter, several pretrial hearings were had. As a result, several orders were entered, from November 30 to December 22, 1955, staying execution, issuing a writ of habeas corpus, relating to appellant's custody, impounding stenographic notes, providing for conferences between appellant and his counsel, fixing the date of trial, and continuing the date of trial.

Later, on December 29, 1955, appellant filed an affidavit under 28 U.S.C.A. §144, supported by the required certificate of good faith, to disqualify Judge Goodman from trying the case. Five reasons for the belief that bias or prejudice existed were given in this affidavit.[19]

The first of the reasons stated in the affidavit was based upon facts known to appellant on November 30, 1955, when the remanded habeas corpus proceeding was assigned to Judge Goodman. As to this reason, the affidavit filed on December 29, 1955, came too late. *Lipscomb v. U. S.*, 33 F. (2d) 33; *Skirvin v. Mesta*, 141 F. (2d) 668.

The four remaining reasons set out in the affidavit are based upon observations and rulings made by the trial judge while considering the case.

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[19]The reasons given are as follows: (1) Asserted intemperate observations and arbitrary action in denying the petition when it was originally filed. See **In re Chessman**, 128 F. Supp. 600; (2) failure to enter a pretrial order concerning appellant's custody in keeping with views expressed by the judge in an earlier **ex parte** pretrial hearing; (3) the observation made by Judge Goodman, at the pretrial hearing of December 16, 1955, that ". . . this should be in the State of California, but until there is some change in the statutes, we have got to use this laundry to take care of this matter. . . :"; (4) asserted failure to enforce a previously entered order concerning arrangements for conferences between appellant and his counsel; and (5) refusal to grant as long a continuance of the trial as appellant had requested.

The conduct and rulings of the trial judge in the case itself provide no basis for an affidavit of bias or prejudice. *Ex parte American Steel Barrel Company*, 230 U. S. 35, 44, 57 L. Ed. 1379, 33 S. Ct. 1007; *Refior v. Lansing Drop Forge Co.*, 124 F. (2d) 440, 444, cert. denied 316 U. S. 671, 86 L. Ed. 1746, 62 S. Ct. 1047. As stated in the *American Steel Barrel Company* case, the statute authorizing the filing of an affidavit of bias or prejudice was

> "... never intended to enable a discontended litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause."[20]

The trial judge, therefore, did not err in declining to disqualify himself.

Quite apart from the efficacy of the affidavit of prejudice, however, is the question whether appellant had a fair trial before a fair tribunal. This is a basic requirement of due process. *In re Murchison*, 349 U. S. 133, 99 L. Ed. 942, 75 S. Ct. 623. As stated in the recent case of *Knapp v. Kinsey*, 232 F. (2d) 458, 465:

> "One of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that fairness requires an absence of actual bias or prejudice in the trial of the case."

With this in mind, we have examined the record with respect to the incidents and rulings during the course of the hearing, of which appellant makes complaint in his affidavit.

Some remarks made by the judge at an *ex parte* pretrial hearing may have led appellant to believe that more favorable orders concerning custody and conference arrangements would be made. That the judge, after hearing both sides, changed his mind concerning these matters does not, however, indicate personal bias or prejudice against appellant. Nor was the observation made by the judge, to the effect that there should not be federal judicial intervention in such cases, or his picturesque reference to his court as a "laundry," indicative of personal bias

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[20]230 U. S. at 44, 57 L. Ed. at 1383, 33 S. Ct. at 1010. We need not decide whether the original order of January 4, 1955, denying the writ was an "adverse ruling" within the meaning of this rule.

against appellant. The specific rulings of which complaint is made have been examined under other specifications of error, and have been upheld.

We conclude that none of the criticized actions and rulings, nor all of them together, evidence anything approaching the personal bias or prejudice which would amount to a denial of due process.

We have now considered, and found without merit, all of the objections raised by appellant as to the conduct of the habeas corpus hearing. Accordingly, we hold that appellant was not denied a full and fair hearing, as impliedly ordered by the Supreme Court.

Under another specification of error, it is argued that the court erred in ruling, on jurisdictional grounds, that it could not declare appellant's rights under 28 U.S.C.A. §§2201 and 2202.

On January 24, 1956, one day before the end of the habeas corpus hearing, appellant filed an "application for declaration of rights." One purpose of the application was to establish appellant's right to an unpublished novel, "The Kid Was a Killer," written by appellant. This manuscript had been seized and held by the warden. It was alleged that the sale of the manuscript was necessary to enable appellant to pay his expenses in the habeas corpus case.

A second purpose of the application was to establish the validity of a contract between appellant and one of his counsel. Under this contract, appellant, as substantial payment on attorney's fee, agreed to write a biography of the attorney. It was alleged that the warden had refused to allow appellant to write this biography.

The application was denied on the ground that declaratory relief may not be sought in a habeas corpus proceeding, and that the court had no jurisdiction over the security regulations at the prison.

The writ of habeas corpus is concerned solely with the legality of the prisoner's restraint at the time of the filing of the petition for its issue.[21] Declaratory relief of the kind here sought is not within the scope of such a proceeding. The court was, therefore,

[21] **Dunlap v. Swope**, 103 F. (2d) 19, citing **McNally v. Hill, Warden**, 293 U. S. 131, 79 L. Ed. 238, 55 S. Ct. 24, and **Smith v. Johnston, Warden**, 83 F. (2d) 821.

without jurisdiction to entertain the application, and correctly so ruled.

One specification of error remains to be considered.

Appellant was not permitted to be present at the time the reporter's transcript of the original trial was settled and certified. Nor was he represented by counsel at that hearing, since he had insisted on litigating *in propria persona*. It is argued that, by reason of these facts, appellant was denied due process of law and the equal protection of the laws in connection with his appeal to the California supreme court. Accordingly, appellant contends, the trial court, in this habeas corpus proceeding, erred in not ordering appellant discharged from custody.

This issue was tendered in the application for a writ of habeas corpus. It was not, however, the issue which concerned the United States Supreme Court in reversing and remanding for a hearing on the application. As noted above, the opinion of the Supreme Court directs attention only to the undenied charge of fraud in preparing and settling the transcript.[22]

Because of this, the trial court, on remand, limited its consideration of the case to the question of fraud. The extensive opinion of the trial court contains no discussion of the issue which appellant presents under this specification of error. Nor are there any findings of fact or conclusions of law which deal with that issue.

We assume, without deciding, that, despite the circumstances just indicated, appellant may here present the question now under discussion.[23]

That precise question, however, has heretofore been considered, and decided adversely to appellant, by both the California supreme court and this court.[24]

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[22]The charge was "undenied" only because the petition was summarily dismissed before hearing. Similar charges of fraud had been repeatedly made, denied, and rejected in prior proceedings, as noted and documented in **In re Chessman**, 43 Cal. (2d) 391, 408, 274 P. (2d) 645, cert. denied 348 U. S. 864, 99 L. Ed. 681, 75 S. Ct. 85.

[23]The certificate of probable cause, issued by a judge of this court, pursuant to which this appeal is brought, is based exclusively upon this due process and equal protection question.

[24]**People v. Chessman**, 35 Cal. (2d) 455, 218 P. (2d) 769, cert. denied, **Chessman v. California**, 340 U. S. 840, 95 L. Ed. 616, 71 S. Ct. 29; **Chess-**

In holding against appellant on a similar contention, the California supreme court said:

> ". . . Neither reason, public policy, nor any express provision of law requires defendant's personal presence at proceedings to determine the accuracy of a transcript. . . . In the trial court he was repeatedly offered and refused counsel . . . In these circumstances he cannot complain that he has been prejudiced by the fact that he has not, since his conviction, been allowed to appear personally in court." *People v. Chessman*, 35 Cal. (2d) 455, 467, 218 P. (2d) 769, 776.

When the identical question was before this court in 1953, we held against Chessman, saying:

> "There is no merit in the contention that the due process provisions of the Fourteenth Amendment were violated. The Constitution gives no right to appear in person or by counsel on a criminal appeal. Whether to grant an appeal, and the terms upon which it will be granted are purely matters of local law over which federal courts have no control. [Citing and quoting Andrews v. Swartz, 156 U. S. 272, 274-275.] . . . And that there can be no denial of due process in the procedure used to settle the record on appeal, see Dowdell v. United States, 221 U. S. 325, 328-329, 31 S. Ct. 590, 55 L. Ed. 753." *Chessman v. People*, 205 F. (2d) 128, 131.

These decisions should not be construed as holding that the Fourteenth Amendment does not apply to settlement proceedings. It clearly does, as evidenced by the fact that our later decision in the instant case was reversed on the ground that appellant's charge of fraud in connection with such proceedings invoked the

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man v. People, 205 F. (2d) 128, cert. denied, **Chessman v. California**, 346 U. S. 916, 98 L. Ed. 412, 74 S. Ct. 278. The California supreme court later re-examined the same question, and adhered to its previous ruling. **People v. Chessman**, 38 Cal. (2d) 166, 238 P. (2d) 1001, 1005, cert. denied, **Chessman v. California**, 343 U. S. 915, 96 L. Ed. 133, 72 S. Ct. 650. An aspect of the same issue was also considered by this court and decided adversely to appellant in **Chessman v. Teets**, 221 F. (2d) 276, reversed on other grounds, **Chessman v. Teets**, 350 U. S. 3, 100 L. Ed. 2, 76 S. Ct. 33. In this decision, we said: "Chessman waived his right to counsel and is now precluded from urging denial of his constitutional right upon this ground." (221 F. (2d) at p. 278)

Fourteenth Amendment.[25] Similarly, had appellant charged fraud in connection with the argument to, or consideration by, the California supreme court, the Fourteenth Amendment would have been invoked.

But, although the Fourteenth Amendment stands in the way of fraud at any stage of litigation, it does not follow that it also guarantees the personal appearance of the defendant at every stage. That it does not afford such a guarantee in connection with settlement proceedings, is the proposition we were stating in the above quotation. The basic premise of this proposition is that the proceeding in which the transcript was certified was a part of the appeal procedure, and not a part of the trial at which appellant's conviction was obtained.

We adhere to that basic premise. Due process does not require the personal presence of a prisoner, even in a capital case, for the consideration of his appeal. See *Schwab v. Berggren*, 143 U. S. 442, 36 L. Ed. 218, 12 S. Ct. 525.

It is true that in such settlement proceedings there are questions of fact to be determined. However, they are questions having to do with the settling and certification of the transcript for purposes of appeal. They involve no inquiry into the guilt or innocence of the defendant. Thus, while the substitute reporter testified at the settlement hearing, he did not appear as a witness for or against the accused. A similar contention that due process required the presence of a defendant at the hearing where the record was amended and certified was specifically rejected in *Dowdell v. United States*, 221 U. S. 325, 55 L. Ed. 753, 31 S. Ct. 590.

There is here no contention that appellant was denied a right which is customarily accorded to other convicted persons.[26] Had such a showing been made, a serious constitutional question would be presented. See *Griffin v. Illinois*, 351 U. S. 12, 18, . . . L. Ed. . . . , . . . S. Ct. . . . .

We have not overlooked the fact that the transcript in question was prepared under unusual circumstances, due to the un-

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[25]See footnote 6.

[26]Rule 33, Rules on Appeal, adopted by the Judicial Council of the State of California, specifying the procedure to be followed, provides for the filing of an application by the appellant for augmentation of the record. It does not, however, provide for the personal appearance of the appellant at the time the record is settled and certified.

timely death of the original court reporter. It is unquestionably true that this raised more serious questions concerning the accuracy and completeness of the transcript than normally arise.

The circumstances just mentioned did not, however, give rise to an absolute constitutional right, otherwise nonexistent, of personal appearance at the settlement proceedings. They called only for the exercise of a sound discretion in adopting procedures adequate to meet the special situation. While the unprecedented privilege of personal participation was denied appellant, he was permitted to, and did, submit extensive written objections. All of these were considered, and some were sustained. Appellant could also have been represented by counsel, had he so chosen.

That the procedures adopted were reasonable and adequate to assure a correct and complete transcript is substantiated by the findings made in the instant habeas corpus hearing. In his application for this writ, appellant alleges that an erroneous and prejudicial instruction and an erroneous and prejudicial comment to the jury were omitted from the transcript. These are the only wrongs asserted to have been done him. But the trial court in the proceeding now under review expressly found that no such instruction had been given or comment made.

This finding was made after a hearing in which appellant appeared personally and testified. At this hearing, he was also represented by two attorneys, had the services of an investigator, produced witnesses, introduced exhibits, had full right of cross-examination, and did cross-examine the only witness who had appeared at the settlement hearing. Appellant has not questioned this finding, though he has made what we have found to be an unmeritorious attack upon the fairness of the hearing.

There is no reason to believe that, if appellant had been personally present at the settlement proceedings, the outcome as to the questioned instruction and comment would have been any different than it was in this habeas corpus hearing. In fact, there is no reason to believe that these points would have been raised, since they were not raised in the written objections which appellant filed at that time.

We conclude that appellant was not constitutionally entitled to appear in person and to participate in the settlement of the transcript.

Affirmed.

DENMAN, Chief Judge, Dissenting:

Since the Supreme Court holds the due process of the Fourteenth Amendment applies to the trial in the Los Angeles Superior Court to create a record of what happened there, as the basis of an appeal from Chessman's death sentence, the Superior Court's admitted refusal to permit him to participate in the trial, denied him due process. Hence the Superior Court's order creating the record must be set aside and the California Supreme Court's affirmation based on that record also must be set aside and the trial for the determination of the record proceed anew in the Los Angeles Superior Court with Chessman participating therein.

PIECEMEAL DUE PROCESS

I dissent from the extraordinary doctrine that the due process clause of the Fourteenth Amendment applies only *in part* to the Los Angeles County Superior Court's trial of facts to determine the transcript of what had transpired in that court, as the basis for the review of that court's death sentence in the California Supreme Court.

Nothing is better established than that the due process of the Fourteenth Amendment requires that a party affected by the decision in it and that, if this be denied, the decision made in his absence must be set aside.[1]

Here was a trial in the Los Angeles County Court to determine what had happened in that court leading to Chessman's death sentence. That county court alone had jurisdiction of the trial for the determination of the record. The record was taken by a reporter who died when he had transcribed but a thousand of the three thousand pages of his shorthand notes. They were written in a system undecipherable by another reporter, a *witness* at the restoration trial. The order for the determination of the record is based on the testimony of witnesses before the Los Angeles County Court of what they heard and remembered of what was said producing the death sentence by the parties' witnesses and of the judge's statements to the jury during the trial and

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[1] Powell v. Alabama, 287 U.S. 45, 67; Snyder v. Massachusetts, 291 U.S. 97, 105; Saunders v. Shaw, 244 U.S. 317, 318; R. R. Company v. Pacific Gas, 302 U.S. 388, 393; Ohio Bell Tel. Co. v. Commission, 391 U.S. 292, 304; Standard Oil Co. v. Missouri, 224 U.S. 270, 281.

of his final instructions to the jury. What the trial before the judge produced was this record of at least 2,000 pages of the testimony.

Chessman's request that he be present in the determination of the 2,000 pages on which his life or death depended was denied by the trial court, though the right to cross-examine the witnesses produced by the prosecuting attorney and in *Los Angeles to seek for and produce other witnesses from the clerks and jurors who heard the trial,* is of the essence of due process. No clearer case could be had for a litigant's presence in the *vicinage of the trial,* i.e., Los Angeles County, where witnesses could be summoned and directly examined and cross-examined and distant depositions not necessary.

It will be remembered that the United States District Court, sitting in the Northern District of California at San Francisco, held it could not summon witnesses from Los Angeles, 400 miles distant.

No one can question that Chessman would have been entitled to a reversal if he had been able to maintain his contention that the judge instructed the jury that if they found he had committed the offense charged they *must* render a verdict for the death penalty, although Section 209 of the California Penal Code provides that they have the discretion to choose between life imprisonment and the death penalty. Reinforcing this is his claim that the true record would show grossly prejudicial statements made by the prosecuting attorney and the presiding judge.

The majority opinion is forced to admit that the Supreme Court has held that the due process of the Fourteenth Amendment applies to the claimed procuring of perjured testimony but it claims that another violation of due process does not. It proceeds on a piecemeal application of the Fourteenth Amendment. In this it relies on Dowdell v. United States, 221 U.S. 325, but omits to state that in that case all the testimony of the criminal trial was written up by a living reporter and that appellant had counsel during his appeal. The point is summarized by the following headnote on page 325:

> "Although due process of law requires the accused to be present at every stage of the trial, it does not require accused to be present in an appellate court where he is represented by counsel and where the only function of the court is to determine whether there was prejudicial error below."

Likewise the majority opinion relies on Schwab v. Berggren, 143 U.S. 442, 449, where again the Supreme Court confined its ruling to the consideration of *questions of law* before the appellate court and suggests that where there are other questions involved the rule might be otherwise, stating:

> "But neither reason nor public policy require that he shall be personally present pending proceedings in an appellate court *whose only function is to determine whether, in the transcript submitted to them,* there appears *any error of law to the prejudice of the accused;* especially, where, as in this case, he had counsel to represent him in the court of review. *We do not mean to say that the appellate court may not, under some circumstances, require his personal presence; but only that his presence is not essential to its jurisdiction* to proceed with the case." (Emphasis added.)

The majority opinion further ignores the subsequent cases in the Supreme Court clearly distinguishing these earlier decisions. Among them is the recent case of Cole v. Arkansas, 333 U. S. 196, 201, where the Supreme Court ruled that:

> ". . . since Arkansas provides for an appeal to the State Supreme Court and on that appeal considers questions raised under the Federal Constitution, *the proceedings in that court* are a part of the process of law under which the petitioners' convictions must stand or fall. Frank v. Magnum, 237 U.S. 309, 327. Cf. Mooney v. Holohan, 294 U.S. 103, 113." (Emphasis added.)

Nor is considered In re Oliver, 333 U.S. 257, 273, where the State Supreme Court affirmed on appeal a contempt judgment "without having seen the record of his [appellant's] testimony" and the affirmation set aside on the ground that the appellant had been denied his liberty without due process of law of the Fourteenth Amendment.

Nor does the opinion consider Frank v. Magnum, 237 U.S. 309, where at page 322 the court states:

> "And while the Fourteenth Amendment does not require that a State shall provide for an appellate review in criminal cases, . . . it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be *regarded*

as a part of the process of law under which he is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the Fourteenth Amendment." (Emphasis added.)

From these later cases it is apparent that if the Supreme Court itself had conducted the trial in which the 2,000 pages of record were established by the memory of witnesses, it would have been a violation of due process to deny Chessman's request to participate in the proceedings. A fortiori, is it a denial of due process where he was excluded from the proceeding in the *Los Angeles Superior Court.*

The District Court of the Northern District of California *by merely ignoring* Chessman's contention of his right to participate in the Los Angeles County evidence restoration hearing, cannot create in itself the right in San Francisco to determine what the record should or should not contain.

Since it is not questioned that Chessman was denied his right to participate in the Los Angeles proceeding, this court should order that the record there created should be set aside and likewise the affirming judgment based on it.

(Endorsed:) Opinion and Dissenting Opinion. Filed, Oct. 18, 1956. Paul P. O'Brien, Clerk.

United States Court of Appeals
For the Ninth Circuit

CARYL CHESSMAN, *Appellant*, vs. HARLEY O. TEETS, Warden, California State Prison, San Quentin, California, *Appellee*.	No. 15,092

JUDGMENT

Appeal from the United States District Court
for the Northern District of California,
Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Judgment. Filed and Entered: October 18, 1956.
Paul P. O'Brien, Clerk.

United States Court of Appeals
For the Ninth Circuit

Excerpt from Proceedings of Tuesday, November 20, 1956

Before: DENMAN, Chief Judge; LEMMON and HAMLEY, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellant, filed November 14, 1956, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

DENMAN, Chief Judge, dissenting.

United States Court of Appeals
For the Ninth Circuit

CARYL CHESSMAN, *Appellant*, vs. HARLEY O. TEETS, Warden, California State Prison, San Quentin, California, *Appellee*.	No. 15,092 Nov. 20, 1956

Upon Petition for Rehearing

Before: Denman, Chief Judge, Lemmon and Hamley, Circuit Judges.

The petition for rehearing is denied.

DAL M. LEMMON
Circuit Judge

FREDERICK G. HAMLEY
Circuit Judge

United States Court of Appeals
For the Ninth Circuit

CARYL CHESSMAN, *Appellant,* vs. HARLEY O. TEETS, Warden, California State Prison, San Quentin, California, *Appellee.*	No. 15,092 Nov. 20, 1956

Upon Petition for Rehearing

Before: DENMAN, Chief Judge and LEMMON and HAMLEY, Circuit Judges

DENMAN, CHIEF JUDGE:

I dissent from the denial of the petition for rehearing.

This is clearly a case where the court first finds that the due process clause of the Fourteenth Amendment applies for all appeals created by state law and then in this appeal, a matter of life or death to the appellant, says that it is inapplicable to a trial to determine the text of the record upon which the death sentence is to be determined as valid or invalid.

(Endorsed:) Order and Dissent of Denman, C. J. Filed Nov. 20, 1956. Paul P. O'Brien, Clerk.

United States Court of Appeals
For the Ninth Circuit

CARYL CHESSMAN, *Appellant,* vs. HARLEY O. TEETS, Warden, California State Prison, San Quentin, California, *Appellee.*	No. 15,092 Nov. 27, 1956 Nov. 28, 1956

On Denial of the Petition for Rehearing

LEMMON, Circuit Judge.

[Memorandum in connection with the denial of the petition for a rehearing]

In view of Chief Judge Denman's insistence that the due process clause of the Fourteenth Amendment guarantees the personal appearance of the defendant at settlement proceedings to determine the accuracy of a transcript, I deem it desirable that I should give my reasons for concurring with Judge Hamley in denying Chessman's petition for a rehearing.

Chief Judge Denman persists in ignoring the opinion of the Supreme Court in 350 U.S. 3, 4, which is not only the chart by which we must plot our course, but which marks the *extreme limits* of our *jurisdiction* in this cause.

Although the Supreme Court's opinion is quoted in part by Judge Hamley in his able opinion of October 18, 1956, in which I unreservedly and heartily concur, in view of Chief Judge Denman's persistent ignoring of our limited jurisdiction in this case, I believe that it might be helpful to enlarge the quotation.

Speaking per curiam, the Supreme Court said:

> "The official court reporter had died before completing the transcription of his stenographic notes of the trial, and petitioner alleges that the prosecuting attorney and the substitute reporter selected by him had, by *corrupt* arrangement, prepared the *fraudulent* transcript. On the record before us, there is no denial of petitioner's allegations. The District Court, without issuing the writ or an order to

show cause, dismissed the application as not stating a cause of action. 128 F.Supp. 600. The Court of Appeals affirmed the order of the District Court. 221 F.2d 276. The charges of *fraud* as such set forth a denial of due process of law in violation of the Fourteenth Amendment. See *Mooney v. Holohan*, 294 U.S. 103. Without intimating any opinion regarding the validity of the claim, we hold that in the circumstances disclosed by the record before us the application should not have been summarily dismissed. *Accordingly*, the petition for a writ of certiorari is granted, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court for a hearing." [Emphasis supplied]

If the English language means anything at all, the opinion of the Supreme Court conveyed a command to the District Court that it inquire into Chessman's charges of "fraud" and "corrupt arrangement", *and nothing more*. Beyond that, neither the District Court nor this Court has a particle of jurisdiction.

As the main opinion states, pursuant to this mandate of the Supreme Court, a writ of habeas corpus was issued by the District Court, a hearing consuming seven days was had, and the District Court filed an opinion, findings of fact, and conclusions of law, to the effect that Chessman had failed to support the allegations of his application. From the District Court's judgment discharging the writ, the present appeal was taken.

As Judge Hamley states in the majority opinion herein, although the Fourteenth Amendment prohibits *fraud* at any stage of litigation, it does not follow that it guarantees the personal appearance of the defendant in proceedings to settle the record on appeal.

The majority opinion goes further and points out that the District Court found that there was no factual basis for Chessman's allegation that the transcript on appeal had been fraudulently prepared, and also states that Chessman does not directly challenge any of those findings.

With the above findings and holdings, the jurisdiction of the District Court and of this Court ends. *Ex industria*, however, the majority opinion holds that appellant was not constitutionally entitled to appear in person and to participate on the settlement of the transcript.

The matter should end there.

It has been said that the substantive criminal law is for the protection of the public, and the procedural criminal law is for the protection of the innocent. Nowhere does Chessman claim that he is innocent.

In this connection, I might advert to the fact that the House of Representatives of the United States on January 19, 1956, passed H.R. 5649, which provides that "A Justice of the Supreme Court, a circuit judge or a district court or judge shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State court, only on a ground which presents a substantial Federal constitutional question (1) which was not theretofore raised and determined, (2) which there was no fair and adequate opportunity theretofore to raise and have determined, and (3) which cannot thereafter be raised and determined in a proceeding in the State court, by an order or judgment subject to review by the Supreme Court of the United States on writ of certiorari."

I am in hearty accord with the spirit of this bill, which I understand has not yet been passed by the United States Senate. Even in the absence of such a law, however, I am of the firm conviction that no United States Court should, in the absence of cogent Constitutional reasons wholly absent in this case, interfere with the lawful process of the courts of any State.

Chessman's case has been before the courts of California and of the United States for many years. The "law's delay" in this case has become a national scandal. The details of that delay are carefully spelled out in the majority opinion, and it would be a work of supererogation for me to trace it further.

There remains only one more step to be taken in the case of the State of California versus Caryl Chessman. That step will be to carry out one of the two sentences of death entered against Chessman eight and a half years ago.

Chessman has been accorded all due process except the long overdue process of his execution. By such execution, perhaps, the blot upon the California's juristic escutcheon will be, if not wholly erased, at least partly dimmed.

(Endorsed:) Opinion of Lemmon, C. J., on denial of petition for rehearing. Filed Nov. 27, 1956. Paul P. O'Brien, Clerk.

Denman, Chief Judge:

No better illustration could be had of the aphorism "hard cases make bad law," than Judge Lemmon's opinion in denying Chessman's petition for rehearing in this case. After first concurring in Judge Hamley's opinion considering the two denials of due process claimed by Chessman, in this opinion on the requested rehearing he asserts that the Supreme Court's decision in 305 U.S. 3 made one of the contentions, so decided in Judge Hamley's opinion, beyond this court's jurisdiction.

In stating that Chessman has been deprived of the right so recognized by Judge Hamley, Judge Lemmon appears to be moved by the fact, as he states it, that "Chessman's case has been before the courts of California and of the United States for many years. The 'law's delay' in this case has become a national scandal."

I do not agree with the contention that the same question of law is to be decided in one way if considered at the beginning of a prosecution, and in a different way if it is for consideration after seven years of prosecution of the same case. Equally unfair to Judge Hamley is Judge Lemmon's criticism that he gave consideration to Chessman's second contention, when the court had no jurisdiction so to act.

Nor do I agree with Judge Lemmon that a litigant's claim to a constitutional right in an instant case, is to be construed one way if he has no prior convictions and the opposite way if he has a dozen priors.

Two different claims of denial of due process were presented by Chessman's application to the district court. One is the contention of "fraud" on Chessman by the preparation of a false transcript of the proceedings at the trial as a result of which were omitted rulings and statements of the trial judge which, if true, would warrant a reversal. The second such denial of due process is the denial of Chessman's requested right to participate in the proceeding in which, on account of the death of the reporter, 2000 pages of the record had to be made up on the testimony of witnesses, who should have been subject to his cross-examination. Further, had he been present in Los Angeles he would have been able to produce evidence from the jurors and others present in the courtroom to sustain his contention respecting the claimed omitted rulings.

The difference between the two kinds of denial of due process is so obvious that, as seen, Judge Hamley gave it a separate consideration in his opinion. That the Supreme Court passed only on the fraud contention is apparent from the quoted matter in Judge Lemmon's opinion. Nowhere does it deny the District Court the jurisdiction to consider the second contention presented in Chessman's application for the writ.

Though it may well be a matter of life or death to Chessman, Judge Lemmon would have it that the Supreme Court in its opinion overruled, sub silentio, its several holdings that any important appellate proceeding is a part of the due process of the Fourteenth Amendment.[1] Here the making up of 2000 pages of testimony for the appeal, largely by the testimony of witnesses as to what they heard, is of vital importance and hence that Chessman should have participated in it.

In neither our opinion in Chessman v. Teets, 221 F.2d 276, nor in the Supreme Court opinion in 350 U.S. 3 (1955) is mentioned, much less disposed of, Chessman's contention. It is absurd to argue in any case, that the Supreme Court, by mere silence on a contention not presented to it, decides that contention adversely to the party making it. A fortiori is the absurdity of such a contention in a capital case.

(Endorsed:) Opinion of Denman, Ch. J., on denial of petition for rehearing. Filed Nov. 28, 1956. Paul P. O'Brien, Clerk.

As amended by Order filed December 13, 1956.

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[1] [illegible] v. Arkansas, 333 U.S. 196, 201; In re Oliver, 333 U.S. 257, 273 and in Frank v. Magnum, 237 U.S. 309, 322, more fully considered in Chessman v. Teets, No. 15,092, page 18 [illegible] F.2d [illegible] decided October 18, 1956.

In the Supreme Court
of the
United States

October Term, 1956

No. [redacted] 893

CARYL CHESSMAN,
Petitioner,

vs.

HARLEY O. TEETS, Warden of the California State Prison, San Quentin,
Respondent.

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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Petitioner pro se.

ROSALIE S. ASHER,

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 566 Misc.

CARYL CHESSMAN,
Petitioner,

vs.

HARLEY O. TEETS, Warden of the California State Prison, San Quentin,
Respondent.

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

REPLY TO RESPONDENT'S STATEMENT OF FACTS, PREFACE TO ARGUMENT, AND ARGUMENTS.

A full reply might be made in two sentences:

Adjectives are no competent answer to facts.

Oversimplification is not a fair or valid substitute for reasoned opposition to a petition for a writ of certiorari in a death case.

Having set forth the facts in his Petition for a Writ of Certiorari, Petitioner will not unduly burden

the record by repeating them here. However, it is necessary to call this Court's attention to certain incorrect statements and half truths contained in Respondent's brief. Petitioner must also except to and controvert Respondent's "Preface to Argument" (Resp. Opposition to Petition for Certiorari, pp. 6-7), with its grave, but unfounded, charges. And it should be noted here that Respondent does not cite one specific instance of alleged scurrility or misleading statements. While neither Petitioner nor his counsel desire to engage in this unbecoming quibbling with opposing counsel, it must be patent to the Court that the Petition for Certiorari is not, as Respondent contends, scurrilous or misleading; and this the Court can determine for itself. Rather than engage in the indignity of stressing that if misleading statements appear in the moving papers before the Court, they abound in Respondent's brief, Petitioner is content to refer this Court to the record to sustain his position and will specifically set forth herein only those misstatements which should be before the Court in its determination of the matter. That some such misstatements must be noted is emphasized by the fact that this is a capital case which will be laid to rest, once and for all, by the decision herein, upon which decision the very life of Petitioner depends.

On the other hand, Respondent (Resp. Opposition to Petition for Certiorari, p. 7) promises to "seek to correct a few of the most glaring of [Petitioner's] [alleged] misstatements." But he fails to do so; and, once again, nowhere does Respondent mention or point

to one instance of his asserted "intemperate abuse of Federal judges and persons connected with Petitioner's prosecution."

Such claims should not be lightly made; and they have the effect of eliminating Respondent's brief as an aid to the Court. Objectively questioning the propriety of a judge hearing and deciding a case, or vigorously presenting, in good faith, a charge of fraud against the prosecutor and his uncle-in-law should lead neither to attacks upon this condemned Petitioner nor to the grossly wrongful characterization of the contents of his petition.

While it may be collateral, reference should be made to the statement at page 3 of Respondent's brief to the effect that custody of the Petitioner was transferred to the Marshal. Technically this may have been correct; but it was, at best, a constructive custody which was so transferred; and, as the record abundantly shows, petitioner's actual and physical custody remained with the Respondent, with the consequent unconstitutional restrictions upon Petitioner's opportunity to prepare for the hearings in the District Court.

Furthermore, at page 2 of his brief, Respondent usurps the function of this Court when he states that a hearing was ordered "on the question of fraud and collusion in the settlement of the record." As clearly shown by the Petition for a Writ of Certiorari, the scope of the hearing ordered by this Court in 350 U.S. 3 is at the very heart of the present appeal to the

Court. If further proof of this statement is needed, all that is required is a reading of the opinions of Judges Lemmon and Denman on denial of the petition for a rehearing (239 Fed. 2d 205 at 221 and 223), said opinions being set out in the Appendix to the Petition herein.

As he has throughout the instant proceedings, Respondent makes the misleading claim that Petitioner does not "attack the sufficiency of any findings of fact" made by Judge Goodman. While this may, in a sense, be literally true, it is an attempt to mislead the Court into thinking that Petitioner does not except to or question the propriety of those findings, which he most emphatically does. True it may be that upon the evidence before it—on the very restricted evidence which was admitted by the District Court—the findings may be said to be "sustained"; however, had that Court admitted the evidence which it prejudicially and erroneously refused, it is Petitioner's contention that the proof would have compelled findings in his favor.

As one example: at page 5 of his brief, Respondent stresses the fact that it was found that Fraser was not a discredited reporter from another state and that he had not at any time been discharged for incompetency or drunkenness. Yet the Court, as Petitioner has shown in his Petition, refused to order the production of evidence in support of those allegations in the petition for habeas corpus when it refused to arrange for the production of Judge Paonessa, counsel for Petitioner having made an offer of proof to the

effect that he would show by Judge Paonessa that he had discharged Fraser for incompetency and drunkenness.

Similarly, the Court erroneously, and to Petitioner's prejudice, excluded evidence proferred to show that Fraser was inebriated at the very time when he was engaged in preparing the transcript here attacked. Petitioner sought an order to show Fraser's arrest record, offering to prove thereby that he was arrested for inebriety during that period. The order was denied, and the evidence thereby rendered unprocurable. Further, petitioner sought to procure the testimony of Mrs. Eva Hoffman, either in person or by deposition that she knew of her own knowledge that Fraser was, during the time of the preparation of the transcript, so inebriated as to be incapable of performing the work. Another denial. Additionally, petitioner sought an order to produce Fraser's hospital records which, although pertaining to an "illness" in 1953, would (as Petitioner offered to prove) have shown a long history of addiction to alcohol, existing at the time in question. Again, the familiar pattern of denial. And in view of this pattern and considering the one-sided evidence which the District Court did permit to be introduced, Petitioner cannot in good conscience say that the evidence does not support the findings made. But he can, and most vigorously does, maintain that the findings are erroneous because the District Court prejudicially and erroneously refused to admit proper proof of the allegations in the petition for habeas corpus.

Respondent nobly attempts to convince the Court that the hearings were full and fair, conducted without bias. He urges that the charges of bias and prejudice were "fully reviewed by the United States Court of Appeals and that Court's determination that petitioner had a full and fair hearing is correct." But Respondent carefully avoid the harsh language used by Judge Lemmon, to which reference is made in the Petition for Certiorari (pp. 26-28). Nor does he even mention the fact that the Court of Appeal's decision against Petitioner was by a mere two-to-one vote. Likewise does Respondent avoid any reference to the vigorous opinions of Judge Denman.

The questions as stated by Respondent at page 2 of his brief, oversimplified as they are, are not a fair substitute for those set out in the Petition for a Writ of Certiorari (pp. 6-8), which Petitioner conscientiously tried to put as briefly and succinctly as could be done. It is for reasons such as this that, although believing his position is fairly and convincingly put in the Petition for a Writ of Certiorari, that Petitioner has felt impelled to file this Reply to Respondent's Opposition.

ARGUMENT.

I. THE IMPORTANT CONSTITUTIONAL QUESTIONS AS TO THE ASSAILED CONDUCT OF THE PROCEEDINGS, THE QUALIFICATIONS OF JUDGE GOODMAN, AND THE QUESTIONED FAIRNESS OF THE APPELLATE COURT SHOULD BE DETERMINED BY THIS COURT.

First let it be said that Petitioner does not raise in his Petition for a Writ of Certiorari any issues which were not presented to the Circuit Court of Appeals. Rather than labor the point that Petitioner did in fact attack the propriety of the District Court's findings in the Court of Appeals, Petitioner here makes reference to pages 26-31 of his opening brief in the Circuit Court, where, amidst a lengthy discussion, he says:

> "Clearly, appellant lost his case solely because he was prevented from proving his charges."

Reference is also made to another detailed discussion at pages 1-3 of his closing brief in the Circuit Court where it is stated, in part:

> "This statement . . . seemingly is calculated to convince this Court, in effect, that because, so respondent claims, appellant does not challenge the District Court's findings as *such*, the appealed order may be affirmed without further consideration. But appellant's procedural attack upon the order is even more fundamental than would be an attack upon its findings . . ."

See, also, pp. 20-26 of Petitioner's same closing brief, where this Petitioner clearly attacks the sufficiency of the findings now under discussion, on the same grounds as herein.

This Court can see for itself whether there was an attempt to challenge the propriety of the findings that there was no fraud or collusion by the prosecutor, the substitute reporter or the Court, or the finding that the Court reporter transcribed the notes of the deceased reporter with fairness and accuracy. Petitioner's allegations of fraud and inaccuracy were, and are, at the core of this present proceeding, and, as the Court knows, if Respondent does not, are properly brought here for review.

The answer to Respondent's contention that Petitioner did not object to any of the questions put to witnesses Fraser or Burdick has been so frequently and carefully set out that Petitioner is reluctant to repeat it here. Yet Respondent's urging of the point makes such repetition necessary; and the answer is merely this: the District Court had ruled as to what evidence it would and, more importantly, what it would not, hear. (*Cf. Remmer v. United States*, 350 U.S. 377.) Counsel was hardly in a position, as any trial counsel can appreciate, to risk the judicial consequences of pressing the matter further.

Respondent also, absent any evidence in the record—indeed, contrary to the record—chooses to speculate as to why Petitioner's expert witness was not offered; and Respondent's untrue and unsupported guess on this subject is refuted by the affidavit of Petitioner filed with the District Court in conjunction with his seeking of declaratory relief. That sworn statement shows that the expert refused to testify unless he were paid an additional sum, and that Petitioner's funds

At page 10 of the Opposition to Petition for Certiorari, Respondent asserts that "Petitioner raises a false issue in his contention that the District Court precluded him from offering arrest records and hospital records concerning the substitute reporter." One answer to this is that Petitioner sought the production of the records, rather than formally offering them in evidence, for the simple reason that they could not be produced without such an order (as appears in the record) and that, not being able to produce them, Petitioner obviously could not offer them. But, further, if this can in truth be said to be a "false issue," perhaps Respondent can explain to the Court why the District Court made findings on these points, without production or proof of the records.

To make the claim, as Respondent does, that these records would not necessarily have a bearing on the issue of fraud or collusion is to ignore the true situation. It was shown without contradiction that the prosecutor procured Fraser to do the transcription and that Fraser was related to him—was his wife's uncle. It is a fair and reasonable assumption from the evidence that there was a close association between them. It was further shown that Fraser, as the instance of the prosecutor, was paid far in excess of the ordinary statutory fee for such work. If, in fact, Fraser was shown to have been intoxicated while working on the transcript, it is also fair to assume that such fact was known to Mr. Leavy and, it is submitted, might well furnish the basis for any inference of fraud and collusion. Had Petitioner been permitted to estab-

lish these facts, surely it cannot be said to be either proper, usual or customary under all of the circumstances for the prosecutor to employ a reporter, his own uncle-in-law, known by him to be habitually addicted to the use of alcohol and to pay him at an excessive rate. Petitioner was entitled to introduce his evidence giving rise to an inference to fraud and collusion and was entitled to the benefit of that inference.

II. PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION BY THE UNIQUE AND AD HOC METHODS OF THE CALIFORNIA COURT IN PREPARING, SETTLING AND APPROVING, IN THE ABSENCE OF PETITIONER AND OVER HIS OBJECTION, THE REPORTER'S TRANSCRIPT ON THE MANDATORY APPEAL IN A DEATH CASE.

Regardless of any philosophy or policy concerning the desirability of eliminating repetitious petitions, that situation is not presented here. The denial of certiorari in 340 U.S. 840, denying review of the decision of the Supreme Court of the State of California in *People v. Chessman*, 35 Cal. 2d 455, does not have the effect contended for by Respondent of approving the method used by the State Courts in procuring a transcript on appeal. At that time Petitioner's state remedies had not been exhausted, and this Court could not have acted, had it been so inclined. It is also worthy of note that the District Court did not even purport to dispose of the matter on the ground that the habeas corpus petition before it was "repetitious". It simply ignored the question; and if in doing so it is

held to have exercised a "judicial discretion," it is indeed a novel sort of judicial discretion.

That the Court of Appeals did not expressly determine in *Chessman v. Teets*, 221 Fed. 2d 276, that Petitioner had waived his right to counsel at the proceedings for the settlement of the transcript is readily apparent, and the talk of necessity for an "end to litigation" by Respondent circumvents the issue. It was vital that Petitioner be present at those proceedings, inasmuch as he was the one with a knowledge of the facts, the one who knew what evidence was available to support his position. He was not permitted to be present, nor was there counsel to represent him. These proceedings were a part of the State judicial process—a part of the due process of law set up by the State—in which Petitioner should have been afforded his full constitutional guarantees.

In the earlier holding in 221 Fed. 2d 276, the Court of Appeals, holding that there had been a waiver of counsel, clearly had reference to such a waiver at the trial. In its more recent decision, that same Court "adheres to the basic premise . . . that the proceedings in which the transcript was certified were a part of the appeal procedure, and not a part of the trial at which appellant's conviction was obtained"; and a waiver at one point is not a waiver as to all subsequent stages. The decision of the State Court not being *res judicata* (*Reece v. Georgia*, 350 U.S. 85), the statement by the California Court in *People v. Chessman*, 35 Cal. 2d 455, 467, is not of binding effect; moreover, it should be noted that the Court there said:

> "In the trial court he was repeatedly offered and refused counsel, and he has refused to accept the appointment of counsel to represent him before this court . . ."

The Court did not, and could not, say that he was offered counsel at the settlement proceedings; the question was not even mentioned by the California Court.

Two other points in respect of this so-called waiver must be noted: first, it was not a voluntary waiver, in the sense of an affirmative act by Petitioner, but rather a constructive waiver, involuntary and effected by the Court; second, and even more telling, is the fact that Petitioner was not aware that it would be necessary for him to have counsel, inasmuch as the prosecutor had sworn that he, Petitioner, would be produced in Court (see p. 32, Petition for Writ of Certiorari), and Petitioner had motioned the Court to be produced. (Id., pp. 32-33.) As there noted, the trial Court, in charge of the proceedings, itself admitted that Petitioner should have had counsel.

Respondent concedes, as he must, that when a state supplies an appellate process for review of a criminal conviction, such processes must not be discriminatory. But to say that the procedure used in this case "was and is the law of California" is quite another thing. Respondent has not and, it is submitted, cannot, cite any authority for the proposition that this has always been the law in California. Indeed, the California Supreme Court itself recognized the uniqueness of the situation and, in effect, invented an equally unique

tioner, and *only* to him. As argued in the Petition for Certiorari (p. 52), petitioner was thereby deprived of rights mandatorily afforded and in practice granted to all others in his situation in California. Even apart from its infirmity under the Due Process Clause, the procedure must also fall for its failure to provide Equal Protection to Petitioner. As Mr. Justice Frankfurter has stated in the recent case of *Sikes v. Alabama*, 1 L.Ed. 2d 246, 251:

> ". . . the Due Process Clause of the Fourteenth Amendment has placed limitations upon the discretion, unbridled, for all practical purposes, that belonged to the states prior to its adoption, and, more particularly, confines their freedom of action in devising criminal procedures."

And it matters not what other states may afford by way of appellate review, nor what was the practice at common law. It must be assumed that within those other states, such laws as they have are applied equally to all similarly situated. What is pertinent is that the constitution and laws of the State of California have established an appellate procedure uniformly followed in the Courts of that state, save in this one case.

Petitioner's contention is, and was, that by reason of the procedure adopted by the state Courts at the settlement proceedings, those proceedings were so constitutionally lacking as to fall. If Respondent's position were to be followed, then Due Process has lost its vigor and the intent of the framers of the Constitution has been frustrated. It offends the sense of fair

play and justice inherent in that honorable document to conceive of a hearing—upon which a man's life depends—where evidence is taken and issues of fact determined, with the defendant neither present in person nor represented by anyone in his behalf, at the same time when his adversary—the State—is thoroughly and ably represented. Denial of counsel, as a violation of due process, creates an infirmity so vital that it is not waived in this case by any earlier omission to raise the issue. The unconstitutionality goes so deep that it permeates the entire proceedings and, no matter when the issue is raised, vitiates them, by reason of the fact that the Court acted without jurisdiction. Moreover, every presumption is indulged against the waiver of fundamental rights (*Glasser v. United States,* 315 U.S. 60), and Respondent here has not even attempted to overcome that presumption.

CONCLUSION.

This Petitioner has spent more time under sentence of death than any condemned man in this Nation's 180-year history; on July 3, 1957, he will have been doomed for nine long calendar years. The State cannot return those years, whatever wrong may have been done to Petitioner; but it can accord to him his rightful procedural due process. As this Court will have noted, Petitioner is not asking that his judgments of conviction be reversed; he is seeking only a chance, in the State Courts, for a full, fair and final hearing, wherein he may prove the charges that he has made

that the record on appeal in the State Courts is materially and fatally and prejudicially incorrect.

Wherefore, Petitioner submits that the Writ of Certiorari issue and that the holdings and relief prayed for at pages 72-73 of his Petition for Writ of Certiorari be granted.

Dated, March 22, 1957.

Respectfully submitted,

GEORGE T. DAVIS,
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ROSALIE S. ASHER,
Of Counsel.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No. 893

(formerly No. 568 Misc.)

CARYL CHESSMAN,

Petitioner,

vs.

HARLEY O. TEETS, Warden of the California State Prison, San Quentin, California,

Respondent.

PETITIONER'S BRIEF.

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NOTE.

The Transcript of Record from the District Court will be referred to as R. ....., Vol. I.

The Reporter's Transcript of the pre-trial proceedings in the District Court (pre-trial record) will be referred to as PTR ....., Vols. II or III.

The Reporter's Transcript of the hearings in the District Court will be referred to as HR ....., Vols. IV, V, VI, VII, VIII, IX, X, or XI.

The Reporter's and Clerk's Transcripts on Appeal to the California Supreme Court will be referred to as Rep. Tr. ..... and Cl. Tr. .....

The original exhibits before the District Court will be referred to as Pet. Ex. ..... and Resp. Ex. .....

Unless otherwise indicated, emphasis has been added by petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 893
(formerly No. 566 Misc.)

CARYL CHESSMAN,
Petitioner,

vs.

HARLEY O. TEETS, Warden of the California State Prison, San Quentin, California,
Respondent.

PETITIONER'S BRIEF.

The United States District Court for the Northern District of California, Southern Division, discharged a writ of habeas corpus previously granted and remanded Petitioner to the custody of Respondent for execution. (R. 204-215, Vol. I.) Brought here for review was the bare two-to-one judgment, decision and opinion of the United States Court of Appeals for the Ninth Circuit affirming the District Court's action.

(R. 264-281, 286, Vol. I.) On April 8, 1957, this Court granted certiorari and gave petitioner until April 24, 1957, to file this brief.

REFERENCE TO REPORTED OPINIONS.
[Rule 40-1(a).]

Chessman v. Teets (1956), 239 Fed. 2d 205. This is the opinion of the United States Court of Appeals, written by Judge Frederick G. Hamley and concurred in by Judge Dal M. Lemmon, here questioned. A copy of this opinion, the dissenting opinion of Chief Judge William Denman, as well as Judge Denman's dissenting opinion from the denial of rehearing, Judge Lemmon's memorandum opinion and the answering memorandum of Judge Denman are set out in the appendix to the Petition for Writ of Certiorari.

Earlier reported opinions, dealing with various aspects of the litigation are:

People v. Chessman (1950), 35 Cal. 2d 455, 218 P. 2d 769, 19 A.L.R. 2d 1084;

People v. Chessman (1951), 38 Cal. 2d 166, 238 P. 2d 1001;

Chessman v. California (1953), 205 F. 2d 128;

In re Chessman (1954), 43 Cal. 2d 296, 273 P. 2d 263;

People v. Superior Court & In re Chessman (1954), 273 P. 2d 936;

In re Chessman (1954), 43 Cal. 2d 408, 274 P. 2d 655;

In re Chessman (1955), 128 F. Supp. 600;
In re Chessman & People v. Superior Court (1955) 44 Cal. 2d 1, 279 P. 2d 24.
Application of Chessman (1955), 219 F. 2d 162;
Chessman v. Teets (1955), 221 F. 2d 276.

See also the companion case of an alleged and convicted confederate:

People v. Knowles (1950), 25 Cal. 2d 175 *(sub nomine) People v. Chessman,* 217 P. 2d 1.) This is the opinion and decision of the California Supreme Court construing sec. 209 of the California Penal Code under which Petitioner is sentenced twice to death and twice to life imprisonment. Here the state Supreme Court divided four to three, the bare majority holding that robbery *was* kidnapping and punishable as such. The 1951 Regular Session of the California Legislature repudiated this construction by amending the section and granting relief to everyone convicted who had been sentenced to life imprisonment without possibility of parole. (Stats. 1951, ch. 1749, p. 4167.) Yet Petitioner's conviction was allowed to stand (*People v. Chessman, supra,* 38 Cal. 2d 166), although he then apparently was placed in the unique position of being twice sentenced to death for acts (regardless of by whom committed) no longer triable and punishable at all under the kidnapping statute.

The case has been before this Court on six previous occasions on certiorari:

1. *Chessman v. California et al.* (1950), No. 98 Misc., Oct. Term, 1950, certiorari denied October 9, 1950, 340 U.S. 840.

2. *Chessman v. California* (1951), No. 442 Misc. Oct. Term, 1950, certiorari denied May 14, 1951, 341 U.S. 929.

A motion for leave to file an original petition for writ of habeas corpus was also denied.

3. *Chessman v. California* (1952), No. 371 Misc., Oct. Term, 1951, certiorari denied March 31, 1952, 343 U.S. 915; rehearing denied April 28, 1952, 343 U.S. 937.

4. *Chessman v. California* (1953), No. 239 Misc., Oct. Term, 1953, certiorari denied December 14, 1953, 346 U.S. 916; rehearing denied February 1, 1954, 347 U.S. 908.

5. *Chessman v. Teets* (1954), No. 285, Oct. Term, 1954, certiorari denied October 25, 1954, without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court, 348 U.S. 864.

6. *Chessman v. Teets* (1955), No. 196, Oct. Term, 1955, certiorari granted, Court of Appeals for Ninth Circuit reversed, and cause remanded to the District Court for a hearing, 350 U.S. 3.

JURISDICTIONAL STATEMENT.

[Rule 40-1(b).]

Petitioner sought and asked this Court to grant a writ of certiorari under 28 U.S.C. 1254(1).

The petition for the writ was timely. It was filed February 1, 1957, well within the ninety-day jurisdictional period required by 28 U.S.C. 2101(c), which would have expired February 18, 1957. This Court granted the petition April 8, 1957. (*Chessman v. Teets,* 1 L. Ed. 2d ....., 25 Law Week 3293.)

The Court of Appeals decided the case October 18, 1956 (R. 286, Vol. I), and denied a timely filed petition for rehearing November 20, 1956 (R. 287, Vol. I).

Precedent jurisdiction was established as follows:

Jurisdiction of the District Court to entertain the petition was based upon the allegations of deprivation of constitutional rights under the Fourteenth Amendment by the Courts, agencies and agents of the State of California (28 U.S.C. 2241, 2242, 2243), the exhaustion of Petitioner's remedies in the State Courts (28 U.S.C. 2254), including application for and denial by this Court of a petition for writ of certiorari to the Supreme Court of California "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court" (*Chessman v. Teets,* 348 U.S. 864), and this Court's subsequent holding, in granting certiorari, reversing the Court of Appeals, and remanding the case to the District Court for a hearing, that Petitioner's charges, if sustained, set forth a denial of Due Process. (*Chessman v. Teets,* 350 U.S. 1.)

Jurisdiction was conferred on the Court of Appeals to review the order and judgment of the District Court (discharging the writ of habeas corpus previously granted and remanding the petitioner to custody, *Chessman v. Teets*, 138 F. Supp. 761) when that Court's Chief Judge granted a certificate of probable cause to appeal (28 U.S.C. 2253; R. 252-254, Vol. I) and on the same date when Petitioner filed his notice of appeal. (R. 255, Vol. I.) The appeal was prosecuted under the provisions of 28 U.S.C. 1291, 1294(1), 2253, and Rule 73, Fed. Rules Civ. Proc.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

[Rule 40-1(c).]

Constitution of the United States, XIV Amendment, sections 1 and 5:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"
>
> "The Congress shall have power to enforce by appropriate legislation, the provisions of this article."

Constitution of California, Article VI, section 4½:

> "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after *an examination of the entire cause, including the evidence,* the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

California Penal Code, sec. 209, as in effect during Petitioner's trial:

> "Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery or to exact from relatives or friends of such person any money or valuable thing, or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnapping suffers or suffer bodily harm, or shall be punished by imprisonment in the State prison for life without possibility of parole in cases where such person or persons do not suffer bodily harm."

California Penal Code, sec. 209, now in effect as result of 1951 amendment (Stats. 1951, ch. 1749, p. 4167):

"Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward, or to commit extortion or to extract from relatives or friends of such person any money or valuable thing; or *any person who kidnaps or carries away any individual to commit robbery*, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnapping suffers or suffer bodily harm shall be punished by imprisonment in the state prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm.

"Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under this section as it read prior to the effective date of this act shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole."

California Penal Code, sec. 1239 (b):

"When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel."

California Code of Civil Procedure, sec. 953 (c):

"When it shall be impossible to have a phonographic report of the trial transcribed by a sten-

ographic reporter as provided by law or by rule, because of the death or disability of a reporter who participated as a stenographic reporter at the trial, or because of the loss or destruction, in whole or in substantial part, of the notes of such reporter, the Court or a judge thereof shall have power to set aside and vacate the judgment, order or decree from which an appeal has been taken or is to be taken and to order a new trial of the action or proceeding."

California Rules on Appeal, Rule 33 (c):

"Where a judgment of death has been rendered and an appeal is taken automatically as provided by law, *the entire record of the action shall* be *prepared.* For the purpose of computing time for preparation of the record, the notice of appeal shall be deemed to have been filed at the time of rendition of the judgment."

California Rules on Appeal, Rule 35 (b):

"Where a reporter's transcript is required, the clerk, immediately on the filing of the notice of appeal, shall notify the reporter. The reporter shall prepare an original and 3 clearly legible typewritten copies of the reporter's transcript in the manner and form required by Rule 9, and *shall append to the original and each copy a certificate that it is correct.* He shall deliver the original and all the copies to the clerk immediately on their completion, and in no case more than 20 days after the filing of the notice of appeal, unless such time is extended as provided in subdivision (d) of this rule."

THE QUESTION PRESENTED FOR REVIEW.
[Rule 40-1(d)(10).]

As framed by the Court in its order granting certiorari, the question to be decided is:

Whether in the circumstances of this case, the State Court proceedings to settle the trial transcript, upon which petitioner's automatic appeal from his conviction was necessarily heard by the Supreme Court of the State of California, in which the trial Court proceedings petitioner allegedly was not represented in person or by counsel designated by the State Court in his behalf, resulted in denying petitioner due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE.
[Rule 40-1(e).]

A. History of the Present Litigation.

The petition for the writ was originally filed in the District Court as No. 34,375-Civil on December 30, 1954, after this Court had denied certiorari to the Supreme Court of California "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court." (*Chessman v. Teets,* No. 285, Oct. Term, 1954, 348 U.S. 864.)

On January 4, 1955, Judge Louis E. Goodman summarily denied the petition without hearing or requiring Respondent to answer. (R. 24, Vol. I; *In re Chessman,* 128 F. Supp. 600.)

Two days later Judge Goodman refused to issue a certificate of probable cause. (R. 36, Vol. I.) Petitioner then applied to Chief Judge William Denman of the Court of Appeals for the Ninth Circuit for the certificate, and on January 11, 1955, Judge Denman certified there was probable cause to appeal and ordered that Petitioner's execution, then scheduled for January 14, 1955, be stayed. (R. 39-43, Vol. I; *Application of Chessman*, 219 F. 2d 162.) The notice of appeal (R. 37, Vol. I) dated January 5, 1955, was filed, and the appeal docketed as No. 14,621 in the Court of Appeals.

After the cause was briefed and argued on a shortened time, on April 7, 1955, the order denying the petition for habeas corpus was affirmed by the Court of Appeals sitting en banc. (R. 47-48, Vol. I; *Chessman v. Teets*, 221 F. 2d 276.) Rehearing was denied on May 6, 1955, and on May 12 an order amending the order denying rehearing was filed, with Petitioner's stay of execution being thereby terminated.

On May 13, 1955, Petitioner was resentenced to death, with the date of execution in the warrant fixed for July 15, 1955.

On June 30, 1955, the case was docketed in this Court and a petition for a writ of certiorari was filed, No. 196, October Term, 1955. Justice Tom Clark granted Petitioner's application for a stay of execution pending a decision on the petition for a writ of certiorari, the stay order being filed by this Court's clerk on July 6, 1955.

On October 17, 1955, this Court granted certiorari, reversed the Court of Appeals, and remanded the case to the District Court for a hearing. (*Chessman v. Teets*, 350 U.S. 3.) In its Per Curiam opinion, this Court discussed Petitioner's claims and held as follows:

> "Petitioner applied to the United States District Court of California, Southern Division, for a writ of haveas corpus, claiming that his automatic appeal to the California Supreme Court from a conviction for a capital offense had been heard upon a fraudulently prepared transcript of the trial proceedings. The official court reporter had died before completing the transcript of his stenographic notes of the trial, and petitioner alleges that the prosecuting attorney and the substitute reporter selected by him had, by corrupt arrangement, prepared the fraudulent transcript. On the record before us there is no denial of the petitioner's allegations. The District Court, without issuing the writ or an order to show cause, dismissed the application as not stating a cause of action. 128 F. Supp. 600. The Court of Appeals affirmed the order of the District Court. 221 F. 2d 276. The charges of fraud as such set forth a denial of due process of law in violation of the Fourteenth Amendment. See Mooney v. Holohan, 294 U.S. 103. Without intimating any opinion regarding the validity of the claim, we hold that in the circumstances disclosed by the record before us the application should not have been summarily dismissed. Accordingly, the petition for a writ of certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded to the District Court for a hearing."

And in earlier certifying probable cause (*Application of Chessman*, 219 F. 2d 162), Chief Judge Denman observed (R. 41, Vol. I):

> "How important the California law regards the transcription (of the trial proceedings) and certification (as to its correctness) by the reporter is apparent from the fact that in *civil* cases the death of the reporter before his transcription and certification, gives the trial court the discretionary power to set aside the judgment and order a new trial. California Code of Civil Procedure, sec. 953(e). By some quirk in California legislation this does not apply to criminal cases. However, it is obvious that if the reporter's transcript is so important as to give the court such power in a civil case, *a fortiori* it must have such importance in a criminal case, in which, on the evidence to be transcribed, the accused is sentenced to death. Likewise its importance is emphasized by the California law making the appeal automatic from death sentences. California Penal Code sec. 1239(b)."[1]

This Court's mandate came down and was filed in the District Court on November 28, 1955. (R. 53, Vol.

[1]Directly as a result of Petitioner's case, the present session of the California Legislature has taken cognizance of, and is taking steps to correct, this "quirk" in California legislation, as recognized by Chief Judge Denman. State Senate Bill 688, which contains provisions virtually the same as sec. 953(e) of the California Code of Civil Procedure and which would give the trial court discretionary power to grant a new trial in a criminal case in the event the court reporter died, became disabled or his notes were lost, received a "do pass" recommendation from the Senate Judiciary Committee on April 7, 1957. The Senate voted approval of the measure on April 11, 1957, but subsequently voted to reconsider. The bill is backed by the State Bar of California and members of the judiciary.

I.) The matter was assigned back to Judge Goodman on November 30, 1955 (PRT 2-6, Vol. H). Judge Goodman ordered Petitioner's execution stayed (R. 54, Vol. I), and issued a writ of habeas corpus, returnable December 8, 1955 (R. 55, Vol. I.)

Petitioner was produced in Court on December 8, 1955, a return to the writ was filed, it was stipulated that the petitioner was to be treated as a traverse to the return, and hearing of the matter was set for January 9, 1956, then put over one day to January 10, 1956, and later re-set for January 16, 1956.

Having exhausted his funds and credit, Petitioner was obliged to file an affidavit seeking to proceed *in forma pauperis* on January 7, 1956. (R. 139, Vol. I.) On January 10, 1956, Judge Goodman, while expressing doubt it would mean anything, granted Petitioner leave to proceed *in forma pauperis*. (R. 157, Vol. I.)

The ordered hearings were held, with Petitioner present, on January 16, 17, 18, 19, 20, 23 and 24, 1956. (H.R. 1-919, Vols. IV-X.)

On January 25, 1956, Judge Goodman ordered the matter submitted (H.R. 920-923, Vol. XI), and on January 31, 1956, Judge Goodman vacated the stay of execution, discharged the writ, and remanded Petitioner to custody of the Respondent for execution. (R. 204-215, Vol. I; *Chessman v. Teets,* 138 F. Supp. 761.)

Petitioner applied to the District Court for a certificate of probable cause to appeal on February 10, 1956. (R. 218, Vol. I.) On February 15, 1956, Judge Goodman refused to issue the certificate. (R. 251, Vol. I.)

Thereafter, on February 29, 1956, Chief Judge William Denman of the Court of Appeals certified probable cause (R. 252-254, Vol. I) and on that same date Petitioner filed his second notice of appeal. (R. 255, Vol. I.)

Pursuant to the provisions of 28 U.S.C. 1915, on his application, Petitioner was granted leave to prosecute the appeal *in forma pauperis* and on a typewritten record. (R. 261, Vol. I.)

On October 18, 1956, the Court of Appeals affirmed the order of the District Court (R. 287, Vol. I). The majority opinion (R. 264-281, Vol. I); *Chessman v. Teets,* 239 F. 2d 205, was written by Judge Frederick G. Hamley and concurred in by Judge Dal M. Lemmon.

In that opinion the Court of Appeals expressly recognized that Petitioner alleged in the petition that "he had not been afforded effective representation of counsel in the matter of settling the transcript and had been deprived of the right to be present at the hearing on the settlement of the transcript." (R. 266, Vol. I; 239 F.2d at 210.)

Further along the opinion notes that "the (District Court), on remand, limited the consideration of the case to the question of fraud. The extensive opinion of (the District Court) contains no discussion of the issue which appellant presents under this specification of error. Nor are there any findings of fact of conclusions of law which deal with that issue. We assume, without deciding that, despite the circumstances just

indicated, appellant may here present the question now under discussion." (R. 278, Vol. I; 239 F. 2d at 217.)

The question was then considered and decided against Petitioner solely on the basis of the District Court's challenged findings, and earlier decisions of the Court of Appeals and the California Supreme Court. The opinion concluded that Petitioner "was not constitutionally entitled to appear in person and to participate in the settlement of the transcript." (R. 281, Vol. I; 293 F. 2d at 219.)

Chief Judge William Denham dissented. In his dissenting opinion (R. 18-22, Vol. I; 239 F. 2d 205 at 219) Judge Denman maintained that the majority opinion "proceed(ed) on a piecemeal application of the Fourteenth Amendment," and that, under the fact situation disclosed by the record, the state trial Court's order "creating the record must be set aside and the California Supreme Court's affirmation based on that record also must be set aside and the trial for the determination of the record proceed anew in the Los Angeles Superior Court with Chessman participating therein."

A timely filed petition for rehearing was denied November 20, 1956 (R. 287, Vol. I). Again Chief Judge Denman dissented. He stated: (R. 289, Vol. I):

> "This is clearly a case where the Court first finds that the due process clause of the Fourteenth Amendment applies for all appeals created by state law and then in this appeal, a matter of life or death to the appellant, says that it is inapplic-

able to a trial to determine the text of the record upon which the death sentence is to be determined as valid or invalid."

One week following the denial of the rehearing, Judge Lemmon, speaking for himself, filed an extraordinary memorandum opinion (R. 292-295, Vol. I), in which, *inter alia*, he argued that his Court was jurisdictionally barred from considering the question whether Petitioner had a constitutional right to be present at the settlement proceedings, but had considered the question, nevertheless, and that "The matter should end there."

The following day, November 28, 1956, Chief Judge Denman filed his own memorandum opinion, amended by order of December 13, 1956, answering Judge Lemmon and reaffirming his own position. (R. 295-297; 239 F. 2d at 223.)

Thereafter Petitioner filed with this Court his motion and supporting affidavit for leave to proceed *in forma pauperis* under the provisions of 28 U.S.C. sec. 1915 and on February 1, 1957, Petitioner filed his Petition for Writ of Certiorari. Subsequently Respondent filed a brief in opposition and Petitioner filed a brief in reply to that opposition.

A detailed statement of both the pre-trial proceedings and the hearings in the District Court, showing what was proved and what was not permitted to be proved, as well as the manner in which the hearings were conducted, is set out in the petition for certiorari at pages 17-24 and 36-46 respectively. Except to the

extent that these facts have a direct bearing on the single question to be decided, they will not be repeated here.

B. The Court's Order Granting Certiorari.

The Court's order of April 8, 1957 reads in its entirety:

> "The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The case is transferred to the appellate docket and set for oral argument on May 13, 1957, upon the following terms:
>
> "1. The writ of certiorari is limited to the question whether, in the circumstances of this case, the state court proceedings to settle the trial transcript, upon which Petitioner's automatic appeal from his conviction was necessarily heard by the Supreme Court of the State of California, in which trial court proceedings Petitioner allegedly was not represented in person or by counsel designated by the state court in his behalf, resulted in denying Petitioner due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.
>
> "2. Appearances upon the writ of certiorari will be confined to counsel for the respective parties, and their argument will be limited to the single question indicated above.
>
> "3. The brief for the Petitioner will be served and filed on or before April 24, 1957. The brief for the Respondent will be served and filed on or before May 10, 1957. The Petitioner may file a reply brief within one week after the oral argument.

"The Chief Justice took no part in the consideration or decision of this application."

C. Proceedings in the State Courts Relative to, and Facts Adduced in the District Court Dealing With, the Preparation, Settlement, Approval and Acceptance of the Disputed Trial Transcript.

Petitioner was tried in the Los Angeles County Superior Court before a jury for the alleged commission of 18 felony charges. (The original trial record is before this Court as a part of Petitioner's Exhibit 1, records of the California Supreme Court in Crim. 5006, *People v. Chessman.*

The trial was a lengthy one, beginning April 29 and ending May 21, 1948. Petitioner defended himself. (A deputy public defender, Al Matthews, sat with Petitioner during the trial as a "legal advisor", not as counsel. His services in that capacity terminated at the conclusion of the trial.) Eighty-one witnesses for the prosecution and defense testified and were called or recalled a total of more than 120 times. (See Rep. Tr, Vol. I, General Index to Witnesses, pp. i-v.). It will be noted that the testimonial evidence alone comprises 1500 pages of the disputed Reporter's Transcript. (Rep. Tr., pp. 55-1558.) Eighty-four exhibits were offered (See Rep. Tr. Vol. I, Index to Exhibits, pp. vi-x). There were two full days of argument to the jury. (Rep. Tr. pp. 1559-1786.) More than 50 different complex instructions were given. (Cl. Tr. pp. 83-134.)

On May 21, 1948, Petitioner was found guilty of 17 of the charged felonies, acquitted on one. (Cl. Tr. pp.

172-222.) Motion for new trial was denied and judgment rendered on June 25, 1948, and Petitioner was then sentenced twice to death[2] and to 15 terms of imprisonment.[3]

With respect to the two death sentence convictions, an appeal was automatically taken (California Penal Code sec. 1239 (b). As well, out of an abundance of caution, Petitioner noticed an appeal as to all judgments of conviction and from denial of his motion for a new trial on June 30, 1948. (Petitioner's Exhibit 1, Cl. Tr. p. 266.)

The official Court reporter died of heart disease on June 23, 1948 (Pet. Exhibit 18, Death Certificate of Ernest R. Perry),[4] which was after the trial and be-

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[2]For two violations of section 209 of the California Penal Code charging Kidnapping for the Purpose of Robbery, with a finding of bodily harm by the jury and a fixing of the punishment at death.

[3]For two violations of section 209 of the California Penal Code, charging Kidnapping for the Purpose of Robbery, with a finding by the jury of bodily harm and a fixing by the jury of the punishment at life imprisonment without possibility of parole as to one count, and no finding as to bodily harm on the other count; for two violations of section 288a of the California Penal Code; for one count of Attempted Rape; for one count of Grand Theft of an automobile; for eight counts of First Degree Robbery; and for one count of Attempted Robbery.

[4]Before this Court, as a part of the certiorari record, are the original exhibits of both Petitioner and Respondent which were either received in evidence or marked for identification in the District Court. Petitioner's Exhibits 1 to 18, 20 and 21 were received in evidence. (H.R. 152-157, 181, Vol. V; 296, 317, 348, Vol. VI; and 570, Vol. VII.) Petitioner's Exhibits 19 and 22 were marked for identification only. (H.R. 330, Vol. VI and 582, Vol. VII.) Respondent's Exhibits A, B, D, E, F, G-1 through G-6 and H were received in evidence. (H.R. 109, Vol. IV; 277, Vol. V; 387, 396, Vol. VI; 497, Vol. VII, and 905-906, Vol. X.) Respondent's Exhibits C and I were marked for identification only. (H.R. 298, Vol. VI; 831, Vol. X.)

fore he had completed some 1200 pages of testimony, plus another 300 pages of voir dire examination of prospective jurors and the prosecutor's opening address.

Immediately following the pronouncement of judgment, Petitioner moved the trial Court, the Honorable Charles W. Fricke, to set aside and vacate the judgment on the ground it was impossible to prepare a record for use on the automatic appeal. The motion was denied. Judge Fricke stated: "The Court will take judicial notice that Ernest R. Perry, who reported the trial, is dead." He then directed the preparation of the record "to the limit of human beings in their use of human ingenuity." (Pet. Ex. 1, jacket 3; Rep. Supp. Tr. on appeal, proceedings of June 25, 1948, pp. 14-16.)

Preparation of the record by this unique means, under the direction of J. Miller Leavy, Petitioner's prosecutor, was undertaken and Leavy finally selected his uncle-in-law, Stanley Fraser, to attempt a transcription of the dead reporter's shorthand notes. (The alleged relationship between Leavy and Fraser did and does exist. Fraser was and is the uncle-in-law of Leavy.) (H. R. 170, Vol. V; 452 Vol. VII), a fact kept concealed from Judge Fricke until after the transcript was settled. (H.R. 860-861, Vol. X).

A contract between Fraser and the Los Angeles County Board of Supervisors was entered into, cancelled, and then renegotiated, on the positive but unverified representations of Leavy that not only Fraser but other reporters as well could read the notes. (Pet.

Exs. 2, 3, and 4, Secretary of Superior Court file, Board of Supervisors file, and copies of minutes of Board of Supervisors authorizing two Fraser contracts, respectively.) Fraser *was,* as alleged in the petition for habeas corpus, paid over three times the statutory fee for his preparation of the transcript. (H.R. 208-209, Vol. V.)

On September 16, 1948, Harry R. Person, as Chairman of the Executive Committee of the Los Angeles Superior Court Reporter's association, wrote the Board of Supervisors of Los Angeles strongly protesting the letting of a contract for preparation of a contract from Mr. Perry's shorthand notes. (Pet. Ex. 3, true copy in this file; H.R. 69, Vol. IV.) The concluding paragraph of this letter stated:

> "We believe the purported charge against the county is not only an exorbitant one per se, but will reflect further adverse publicity upon our group because we have serious doubts that any reporter will be able to furnish a usable transcript of said shorthand notes. Other reporters of our number have examined and studied Mr. Perry's notes and have reached the conclusion that many portions of the same will be found completely indecipherable because, toward the latter part of each court session, Mr. Perry's notes show his illness. We feel that this should be brought to your attention."

and Judge Fricke *had* heard (he testified in the District Court) that the notes could not be transcribed with sufficient accuracy and that other reporters had examined the notes and could not read them, but

Leavy had represented to him that Fraser could. (H.R. 860, 862-863, 875.)

Petitioner sought a writ of prohibition against preparation of this transcript on the ground the notes could not be transcribed with any reasonable degree of accuracy and, in opposition, both Leavy and Fraser swore Petitioner was wrong and that what amount to a "verbatim" transcript of the trial proceedings was being prepared by Fraser. Leavy further swore that petitioner would have the transcript delivered to him "in court" and would be allowed to make any objections he might have to it at that time. On the basis of these sworn statements, the California Supreme Court summarily denied the writ. (Pet. Ex. 1: *Chessman v. Superior Court,* Crim. 4950: petition, opposing memorandum, and Leavy and Fraser affidavits in support of opposition.) (Judge Fricke testified in the District Court that he had *not* told Leavy he was going to produce Petitioner at the settlement and *never* had given Leavy authority to file the affidavit with the California Supreme Court in which Leavy had sworn Petitioner would be produced in Court at the time of the settlement proceedings. (H.R. 883, 887, Vol. X.)

Preparation of the record thus was permitted to continue, over Petitioner's protests. (Not only did Petitioner futilely seek to halt preparation of the transcript, but he had earlier filed with the Clerk of the Los Angeles County Superior Court an affidavit in which he asked that he be furnished the "raw" transcript—that is, the rough draft of the transcript before it was edited or otherwise changed and copied in

final form: Pet. Ex. 12, handwritten affidavit on file herein. The request was ignored.)

After many months and extensions of time (See Pet. Ex. 1: file of extensions Nos. 2692, etc.), on February 24, 1949, Leavy offered the partial Fraser Reporter's transcript for filing in the trial court. He then said: "In order for Mr. Fraser to complete this record, *it has been necessary to submit to me the rough draft form in order that I may read it before he has copied it into final form.*" (Pet. Ex. 1, jacket 3; Rep. Tr. of Proceedings Refiling of Rep. Tr. on Appeal, p. 3.)

Fraser admitted that he *did* let Leavy check the "rough draft" and *did* "get his (Leavy's) corroboration, his ideas, his recollection in places where I had difficulty. . . ." (H.R. 399, Vol. VI.) Leavy admitted he *did* check the rough draft at both his home and office from time to time—on perhaps more than 25 separate occasions — and satisfy his mind that Fraser "had it." (H.R. 531-532, 536, Vol. VII.) Fraser also used the trial judge's long hand notes as an aid in preparing the transcript. (Resp. Ex. B.)

Without the knowledge of Judge Fricke (H.R. 870-871, Vol. X) or Petitioner (H.R. 592, Vol. VIII), but *with* the knowledge and at the suggestion of Leavy (H.R. 504, 533, Vol. VII), Fraser had conferred with two key prosecution witnesses, Los Angeles detectives Lee Jones and Colin Forbes, about Fraser's rough draft transcription of their trial testimony (H.R. 396-397, 417-420, Vol. VI), thus permitting their testimony to be reconstructed not only in the absence of Peti-

tioner, but out of court and secretly. This fact was not known to the state Supreme Court in any of the proceedings before it, and never disclosed by Leavy or Fraser until the hearing in the District Court. Judge Fricke testified that if he had known Fraser had seen Jones and Forbes, the matter *would* have been raised at the time of the settlement. (H.R. 833, 887, Vol. X.)

On April 11, 1949, on filing the remainder of the transcript, Leavy represented to Judge Fricke: "I have read this entire record, not only every page, but *I feel I have read every word and the only correction I find is the one I am offering at this time . . . I feel this record. . . . what Mr. Fraser prepared from Mr. Perry's notes is as accurate a record as Mr. Perry could have prepared. . . .*" (Pet. Ex. 1, jacket 3: Rep. Tr. of Proceedings re Filing of Rep. Tr. on Appeal, pp. 10-11.) At this same time Leavy represented further: "*. . . he (Fraser) got so he could read Mr. Perry's notes better than his own.*" (Ibid. p. 11.)

Judge Fricke then directed, as appears at the end of the Reporter's Transcript of April 11, 1949, "that defendant appellant be further informed that *there can and will be a hearing for the settlement of this transcript.*" Appellant's copy of the Fraser transcript, as well as a copy of the transcript of these proceedings of February 24, and April 11, 1949, was then mailed to Petitioner and was delivered to him in his death cell. Petitioner[5] then prepared and mailed to

[5]Petitioner, at the time of the settlement of the disputed transcript was appearing in *propria persona*, without representation by counsel. He had been held in San Quentin Prison's death row, awaiting execution since July 3, 1948. For five years and ten

the trial court in Los Angeles his "Motion to Augment and Correct Record," with a long list of noted omissions, and requested corrections with a supporting affidavit. (Pet. Ex. 11.)

In the motion petitioner explicitly stated: "That, as provided by Rule 35 (c), Rules on Appeal, Defendant-Appellant moves a hearing be ordered to determine the jurisdictional question hereinabove raised, to enable the Defendant-Appellant to determine actually the ability of Mr. Fraser to read Mr. Perry's notes, and to enable the Defendant-Appellant to offer a showing this is not, and challenge it as, a usable transcript, and to enable the Defendant-Appellant to point out to the Court the many inaccuracies and omissions in this transcript, to prove these inaccuracies and omissions and for this Court to determine these matters and then if this reporter's transcript can be, in a manner satisfactory and legal, corrected and completed, promptly to do so that the Defendant-Appellant may take his automatic appeal forthwith to the Supreme Court of this State." (Pet. Ex. 11; motion, pp. 2, 3.)

Petitioner further stated: "That affiant has not yet had the opportunity to confer with his legal advisor during the trial and consequently has been hesitant to offer error in certain instances until he has verified this error with his legal advisor." (Pet. Ex. 11, affidavit in support of motion, p. 1.)

Petitioner's express application to be produced in the trial court in Los Angeles when the Fraser tran-

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months from that date he continued to represent himself. (H.R. 564-565, Vol. VII.) Then he finally was able to secure funds to hire counsel. (Ibid.)

script was settled was first denied *without prejudice* by the California Supreme Court (Pet. Ex. 1: application and order of denial in file of Crim. 5006) and simply ignored by the trial Court, Judge Fricke (Pet. Ex. 17: Affidavit responsive to reporter's transcript of proceedings re filing of reporter's transcript on appeal).

The Fraser transcript was settled on June 1, 2, and 3, 1949, at proceedings conducted by Judge Fricke *in the absence of Petitioner,* with Leavy actively participating as counsel for the People. (Pet. Ex. 1, jacket 3: Rep. Tr. of proceedings re settlement of Rep. Tr. on Appeal.)

At that time Judge Fricke admitted: "this situation in which we find ourselves with reference to preparing a proper transcript on appeal is one of those wholly unanticipated situations which is not specifically covered by the rules of the Judicial Council relating to appeals. (Ibid. pp. 16-17.)

Instead of offering Petitioner counsel and holding a *hearing* on Petitioner's motion, Judge Fricke elected rather to criticize the fact Petitioner was forced to represent himself, stating: "So we find the defendant has also handicapped himself by refusing to have the aid of counsel . . . where as a matter of fact the situation is one in which he should have had counsel." (Ibid.)

Petitioner's sworn claims, appearing in the affidavit in support of the motion for a hearing, that Fraser had misrepresented his ability to read the shorthand notes, that Leavy had been guilty of hoodwinking the

California Supreme Court, etc., were met by being brushed aside with Judge Fricke's statement that: "I realize the defendant, being on the defense side of the case, has an impression that everybody is against him and nobody is willing to do anything for him and that everybody is hostile to him; but I think such a conclusion is the result of a biased mind and is not warranted by anything appearing in the record." (Ibid. p. 18.)

Stanley Fraser was then called and testified self-servingly under questioning by Leavy. (Ibid. pp. 19-26.) His ability to read Perry's notes was not tested.

Leavy stood by while Judge Fricke allowed 80-odd corrections proposed by Petitioner in his written list and denied some 140 others. (In view of Leavy's earlier statements—that he had found only *one* correction and that the Fraser transcript was "as accurate a record as Mr. Perry could have prepared"—the volume of allowed corrections and their character indicated the extreme unreliability of Leavy's memory.

Throughout the three days of the settlement proceedings, in no less than 51 instances Judge Fricke stated that Petitioner (in his written list of suggested inaccuracies submitted from prison) had claimed the Fraser transcript was erroneous but "made no suggestion as to what should go in," did not "state particulars," or that "no aid was given by Petitioner." In each of these instances, the corrections or additions sought were disallowed, because Petitioner had not specified with particularity what they were; and Judge

Fricke had ruled on June 1 (ibid. p. 28) that this duty was incumbent upon Petitioner. (That was why Petitioner had motioned to be present; being locked in a death cell 500 miles away, he obviously could make no showing and offer no proof.)

Several times during these ex parte hearings, Judge Fricke noted that they were proceeding "as nearly as possible" in accordance with the Rules on Appeal, but there was no pretense that literal compliance with the rules was possible or even being attempted.

The Fraser transcript was then "approved" by Judge Fricke and filed with the California Supreme Court (ibid., p. 82). Petitioner immediately challenged its validity and accuracy in the latter court by the institution of mesne proceedings. With supporting papers and exhibits, he filed a "Motion for order of the Supreme Court to order the Superior Court to augment, correct and properly certify record, to order a hearing in the Superior Court relative to this matter, and for the Supreme Court to agree to decide, on appeal (or otherwise) certain undecided questions of law relative to the preparation of a reporter's transcript on appeal in a capital offense and the applicability of section 953e to criminal offenses." Petitioner also motioned and briefed an appeal "from the final order of settlement and so-called certification of the Reporter's Transcript." (Pet. Ex. 1: records of California Supreme Court in 5006, motion, supporting papers, and briefs on the attempted appeal.) Subsequently, Petitioner also sought a writ of habeas corpus as a suggested aid of appellate juris-

diction which was summarily denied June 12, 1950. (Pet. Ex. 1: *In re Chessman*, file of Crim. 5110.)

Then, on August 18, 1949, Leavy presented himself to Judge Fricke, asked the record to show "we are proceeding in open Court on a regular Court day, and may the record show I have subpoenaed as witnesses here today" Ed Bliss and Al Matthews. Leavy asked the record to show further that Petitioner had an appeal pending in the State Supreme Court from the settlement and certification of the Fraser transcript and a motion "to compel this (Superior) court to permit him to be present in Court when there is a further settlement of the record, and to attempt to compel the Supreme Court in some way to claim this record is not usable. . . . In order to meet the appeal and motion", he asked to call the two witnesses. (Pet. Ex. 1, jacket 3: Supplemental Reporters transcript on Appeal, August 18, 1949, pp. 2-3.)

In the face of this candid admission by Leavy that he wished to use the trial court and its processes to foreclose a hearing on Petitioner's claims and to keep Petitioner out of court, Judge Fricke stated:

> "I will allow the taking of testimony with the idea of assisting the Supreme Court in the determination of the motion . . . and to shed further light on matters which are not covered." (Ibid. pp. 3-4.)

The two witnesses, adverse to Petitioner, then proceeded to give their testimony in the absence of Petitioner.

Still over Petitioner's vigorous objection, with portions being ordered added to it but with *hearings* on its validity and adequacy never being held, this Fraser transcript was ultimately accepted by the California Supreme Court.[6] (*People vs. Chessman*, 35 Cal. 2d 455, 218 P. 2d 769, 19 A.L.R. 2d 1084), and subsequently used on the mandatory appeal as a basis for affirming the death and other judgments imposed. (*People vs. Chessman,* 38 Cal. 2d 166, 238 P. 2d 1001.)

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[6]That Court admitted the challenged transcript was "prepared in a situation for which the Rules on Appeal do not expressly provide (p. 458 of 35 Cal. 2d); that "Concededly the reporter's transcript is not a verbatim record of every word that was said in the trial court" (p. 461 of 35 Cal. 2d); that it was not certified as correct as required but only certified to be correct to the best of the substitute reporter's ability (pp. 458-459 of 35 Cal. 2d). While recognizing that, under State law, Petitioner was entitled to the *entire* record (p. 459 of 35 Cal. 2d), the Court refused to order the record augmented to include in the transcript a "Discussion as to subpoening witnesses" (Pet. Ex. 1; Rep. Tr. p. 10), and a "discussion between the trial court, counsel and the defendant (Chessman), and conceded by the deputy district attorney, that an attorney, William Roy Ives, if given the opportunity to prepare the case, would appear with or for the defendant," (p. 465 of 35 Cal. 2d), both discussions taking place after the case was called.

Finally, while recognizing that a determination of whether one reporter can transcribe another's shorthand notes "is essentially a question of fact to be determined in each case in which it may arise (p. 461 of 35 Cal. 2d), and while placing the burden of proving the prejudicial inadequacy of the transcript upon Petitioner (p. 462 of 35 Cal. 2d), and noticing that Petitioner "urged that he should have been allowed to appear personally in the proceedings which resulted in the present reporter's transcript, and that he should now be allowed to appear personally before the trial judge in support of his position (p. 467 of 35 Cal. 2d), by denying his motions that he be allowed to appear in the Superior Court, adduce evidence and call hostile and unwilling witnesses, the Court itself foreclosed Petitioner from proving the record inadequate, and this was candidly admitted to be done as a discriminatory penalty for self-representation (p. 467 of 35 Cal. 2d). See the dissenting opinions of Mr. Justice Carter and Mr. Justice Edmonds (pp. 468-473 of 35 Cal. 2d).

When the appeal was heard on the merits, Petitioner again vainly challenged the Fraser transcript's validity and adequacy. (Pet. Ex. 1: file of Crim. 5006, Appellant's Opening Brief, Vol. 1, pp. 131-133—"by accepting this reporter's transcript for use on appeal without affording appellant an opportunity to prove it prejudically incomplete and inaccurate and jurisdictionally defective, and by refusing to order portions of the (trial) proceedings added to it in which inhere Federal Constitutional questions, the Court denies to appellant the due process of law and equal protection of the laws demanded by the Fourteenth Amendment to the Constitution of the United States"—. (Appellant's Closing Brief, pp. 78-82.) With his opening brief, Petitioner filed a motion, summarily denied, for the appointment of a referee, a hearing in Los Angeles and a resolution of the questions of fact Petitioner raised concerning the transcript. (Pet. Ex. 1: file of Crim. 5006, motion and order of denial.) Also with his opening brief, Petitioner filed a petition for habeas corpus, attacking the Fraser transcript and praying for a hearing on the issues of fact alleged. (Pet. Ex. 1: *in Re Chessman*, file of Crim. 5217.) The petition was held for nine months and then summarily denied without hearing, opinion, or requiring Respondent to answer.

The lengthy litigation ensued which has culminated in the present proceeding. (See pp. 209-210 of 235 F. 2d.) The basic questions of the accuracy of the Fraser transcript and the competence, ability and qualifica-

tions of Stanley Fraser, the substitute reporter, remain unlitigated and therefore unresolved.

The petition alleged that Fraser was incompetent, had a long record of arrests for being drunk, and was addicted to the excessive use of alcohol. (R. 11-12, Vol. I.) And when questioned by counsel for Petitioner, Judge Fricke testified at the District Court hearing: "I wouldn't have hesitated for a moment in revoking any proceedings that had been had up to that time if I had found out about it afterwards," referring to Fraser's alleged incompetency as a result of his chronic addiction to alcoholic beverages, and: "If I had even heard the rumor, I would certainly have gone out and made an investigation to ascertain whether there was any foundation for it or justification for it." (H.R. 890, Vol. X.) Yet Judge Goodman refused to permit the FBI and CII files which showed Fraser's long arrest record for being drunk and *one arrest while he was supposedly actually engaged in preparing the record,* to be produced. Neither would Judge Goodman arrange for the production of the arrest reports and logs of the Los Angeles Police Department (which had been secreted and kept from Petitioner's investigator) although Petitioner was prepared to prove by them and the officers signing the reports that Fraser was repeatedly drunk during this period. Nor would Judge Goodman arrange for the production of Mrs. Eva Hoffman, by whom Petitioner offered to prove that at the very time Fraser was engaged in working on the transcript, he was so intoxicated as to be men-

tally and physically incapable of doing such work with any degree of competence. Judge Goodman refused as well to order the production of hospital records which would have revealed Fraser had a long and chronic addiction to alcohol, with inevitable brain damage, and which in addition culminated in 1953 in an attempt at suicide, severe delirium tremens, hallucinations that the Mafia was after him, and lengthy hospitalization. (See Petition for Writ of Certiorari, pp. 43-44.)

The petition further alleged the shorthand notes of the deceased reporter were "undecipherable to a large degree" and that Fraser was "incompetent to transcribe" those notes. (H.R. 9-10, Vol. I.) Yet, almost at the outset of the questioning of Fraser by Mr. Davis, Judge Goodman announced flatly that he was not going to allow the accuracy of the Fraser transcript or the ability of Fraser to transcribe the notes to be tested. (H.R. 248, Vol. V.) He stated further:

> "The Court. Of course I don't know what he (Fraser) put down in the transcription.
>
> Mr. Davis. That's what I'm trying to find out.
>
> The Court. I don't think the Supreme Court of the United States intended me to spend in this court days or weeks of time in determining the accuracy of this transcript. *Whether they did or not, I am not going to do it.*
>
> Mr. Davis. Well, could we have perhaps ten minutes on that?
>
> The Court. That is not an issue in this case. This man (Fraser) could have been the most incompetent reporter in the world and he could have made a mess of the transcript in typing it, and

that does not raise any federal question. The State of California and the parties to the litigation could determine that." (H.R. 249, Vol. V.)

And then:

"The Court. That is right, I am not going to test his (Fraser's) ability in this proceeding or whether or not his statement that he transcribed this—made the transcript is correct or not. . . .

If there is any failure of due process, as the Supreme Court has said, involved in this, that is another question. But the mere accuracy of it—it could be—*it could be 75 per cent wrong, and it wouldn't raise any federal question.*" (H.R. 250, Vol. V.)

Judge Goodman added: ". . . but what the State of California affords by way of methods of providing a transcript is not the subject or concern of this Court." (H.R. 250, Vol. V.)

Mr. Davis then made a detailed offer of proof. Judge Goodman gratuitously called it "an argument about what your views are on the matter," and added, "I may be spending my time here listening to disputes between you and some other reporters about whether a certain symbol was blue instead of green. . . ." (H.R. 252, Vol. V.)

Mr. Paul Burdick, an expert witness produced by the Respondent at the District Court hearing and qualified by Respondent as "certainly entitled to give his opinion of *this* transcription" (H.R. 697, Vol. VIII), admitted on cross-examination he could not read a whole page or even half of a specified page of

the Perry notes! He could make out only an occasional word or two. (H.R. 725, Vol. VIII.) (The Perry notebooks are Pet. Ex. 16-A to K.)

Then came a succession of highly damaging and revealing admissions from Mr. Burdick: he found places where argument was left out; where Perry had "skeletonized" his notes; where for six to eight pages the going was "fast and rough"; where words were left out; where as many as seven or eight lines of Perry's shorthand symbols had not been transcribed on argument on the admissibility of testimony. (H.R. 748-753, Vol. IX.) Perry's notes were "difficult to read"; at places they were "shattered" and "shattered clear out of recognition." (H.R. 775, 777, 785, Vol. IX.) The notes on the disputed instructions to the jury were "pretty well cluttered up with those pencilled notations" of Fraser, and those notes, too, were "shattered." Burdick couldn't read them. (H.R. 789, 792, et. seq., Vol. IX.)

SUMMARY OF ARGUMENT.
[Rule 40-1(f).]

In the circumstances of this case, Petitioner was constitutionally entitled to be personally present and represented by counsel at, and to participate effectively in, the proceedings conducted by the State trial court to create and settle the trial transcript which was used on the automatic appeal to the California Supreme Court as a basis for affirming two sentences of death and fifteen sentences of imprisonment. This

transcript was not prepared in accordance with any known law or rule, but by "human ingenuity", under the unsupervised direction of the prosecutor by his own uncle-in-law, from the deceased reporter's old-style, three position, shaded Pitman shorthand notes, the trial judge's "voluminous" longhand notes, conferences with major prosecution witnesses out of court, and other aids. Petitioner, representing himself, and held at the State prison, was given no voice in the selection of the substitute reporter or the means employed to prepare the transcript.

The trial court's admitted refusal to permit Petitioner to participate in, and to be represented by counsel at, the settlement proceedings denied Petitioner, in the circumstances, due process in its most primary sense. The prosecutor had sworn to the California Supreme Court that Petitioner would have the disputed transcript delivered to him "in court" and that Petitioner would be allowed to present his objections to it at that time. The trial court had informed Petitioner "that there can and will be a *hearing* for the settlement of the transcript." And Petitioner had motioned to be produced that he might test the questioned ability of the substitute reporter to decipher the notes and to offer a showing that the transcript was prejudicially incomplete and inadequate.

But Petitioner was not produced. Neither was he offered counsel. The substitute reporter testified, crucial issues of fact were determined adversely to Petitioner, and the transcript was settled and "approved" at ex parte but nevertheless, adversary hearings, con-

ducted in the absence of Petitioner or anyone acting in his behalf. Petitioner was not then or ever permitted to defend against the use of the transcript.

The cases decided by this Court under the Due Process Clause clearly hold that a party affected by the decision of a trial or hearing shall be given notice and an opportunity to participate in it, and that, if this basic requirement be denied, the decision made in his absence must be set aside. The prejudice demonstrably suffered by Petitioner requires such to be done in this death case, and the jurisdiction of the Court to grant the relief sought is plain.

ARGUMENT.
[Rule 40-1(g).]

PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW BY THE UNIQUE AND AD HOC METHODS EMPLOYED BY THE CALIFORNIA COURTS IN CREATING, SETTLING AND APPROVING—IN THE ABSENCE OF PETITIONER AND COUNSEL TO REPRESENT HIM, AND OVER HIS OBJECTION—THE REPORTER'S TRANSCRIPT ON THE MANDATORY APPEAL IN THIS DEATH PENALTY CASE.

The State law on the subject of the type of appellate review to be accorded persons sentenced to death in California is clear, unambiguous, and positive. That law was not, and could not be, followed in this case. An *ad hoc* procedure was invented that violated the most fundamental principles of due process and equal protection guaranteed by the Fourteenth Amendment. The Court plainly has jurisdiction to decide the ques-

tion; and that basic concept of fairness which lies at the core of constitutional due process entitles Petitioner to the relief—the adequate opportunity to defend against the allegedly wrongful taking of his life—he vainly has sought for almost nine calendar years.

A. The Law of California—Substantive and Procedural—Dealing With Review of Death Penalty Convictions by Its Supreme Court.

California Constitution (Art. VI, sec. 4) provides that

> "The Supreme Court (of California) *shall* have appellate jurisdiction on appeal from the superior courts . . . on questions of law alone, in all criminal cases where judgment of death has been rendered. . . ."

Further, California law *mandatorily* requires an automatic appeal to its Supreme Court in capital cases (Calif. Penal Code, sec. 1239 (b)). This appeal is an "extraordinary precaution" taken by the Legislature "to safeguard the rights of those upon whom the death penalty is imposed by the trial court." (*People vs. Bob,* 29 Cal. 2d 321, 328.) In California, "The right of appeal to the Supreme Court is guaranteed by the Constitution to the prisoner, and is as sacred as the right of trial by jury." (*In re Hoge,* 48 Cal. 3, 6; see *In re Albori,* 95 C.A. 42, 48-49.) And "when by judicial oppression such right (of appeal) is violated or vitiated, the guaranteed substantial rights of a party have been materially affected thereby." (*Wuest vs. Wuest,* 53 C.A. 2d 339, 345.)

The rules of the California Judicial Council[7] declare that in a death penalty case, the *entire* record of the trial must be prepared and certified as true and correct by the proceedings. (Rules on Appeal, Rules 33 (c) and 35 (b).) "The Rules on Appeal have the force of law and cannot be disregarded or ignored by litigant or court." (*Kuhn v. Ferry & Hensler*, 87 C.A. 2d 812, 815.) "(T)he procedural rules of the courts are a part of the due process of law established in this state . . . and must be observed in the interest of orderly functioning of the administration of justice." (*People v. Gilbert*, 25 Cal. 2d 422, 439.) And the State's organic law commands that the California Supreme Court must review the *entire* record in a death penalty case before affirming or reversing. (Const. of Calif., Art. VI, sec. 4½.)

Yet here, with the death of the court reporter, the record was not and could not be prepared in accordance with any existing law or rule governing appeals and particularly this mandatory appeal. All state-established due process had to be thrown out and an *ad hoc* procedure had to be invented if a record was to be prepared at all. One was, by "human ingenuity", over Petitioner's vigorous objections. Petitioner was never allowed to defend against this transcript or to be present and represented by counsel when it was created, settled and "approved." His motions, appeals, and habeas corpus applications for a hearing at which he

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[7]The power to make implementing rules governing appeals is vested in the State's Judicial Council, not its Supreme Court. (Const. of Calif., Art. VI, sec. 1a; Calif. Penal Code, sec. 1247k.)

might challenge its validity and test the qualifications and ability of the substitute reporter were ignored or denied. Nevertheless, as shown, it was used as a basis for affirming the judgments of conviction imposing two sentences of death and 15 sentences to prison.

B. The Court's Jurisdiction to Decide the Question.

Petitioner averred in his petition to the District Court, *inter alia,* that the above procedure deprived him "of his constitutional rights and due process of law and equal protection of the law." (R. 8, 14, Vol. I.) It was specifically alleged that "petitioner was deprived of the right to be present at the hearing of the settlement of the reporter's transcript on said automatic appeal," and "said trial court . . . in connection with the matter of the settlement and approval of the reporter's transcript on appeal, and the hearings had thereon, failed, neglected and refused to afford representation to defendant, either by the personal appearance of your Petitioner, or by the appointment of a competent attorney-at-law to represent your Petitioner at these vital proceedings in connection with the settlement of said reporter's transcript. . . ."

On appeal to the Court below, Judge Lemmon, speaking for himself in his unusual memorandum opinion filed in connection with the denial of rehearing, maintained that this Court's opinion in 350 U.S. 3, which addressed itself to the issue of alleged fraud and corruption in the preparation of the transcript, marked the extreme limits of his Court's jurisdiction, and hence that his Court jurisdictionally could not en-

tertain and decide the question. This, of course, is completely incorrect. Judge Denman's answering memorandum opinion of October 28, 1956 provides a decisive reply to this contention. (R. 295-297; 239 F. 2d at 223.) A fundamental question of constitutional law certainly cannot be said to have been adjudicated adversely to Petitioner merely by the Court's non-mention of the question.

Petitioner desires to add just this: This Court has squarely held that decisions in habeas corpus on prisoners in custody under state process are *not* res judicata. (*Brown vs. Allen,* 344 U.S. 443, 457; see *Price vs. Johnson,* 334 U.S. 266, 291.) Where the ends of justice will be served by a successive inquiry, 28 U.S.C. 2244 specifically authorizes the judge or Court to make such an inquiry, and this Court expressly has so held (*Brown v. Allen, supra,* at 508.)

Thus earlier decisions of the Court of Appeals in 205 F. 2d 128 and 221 F. 2d 276, dealing only with fragmented aspects of the question, when the facts on which it was and is based were not before it, were and are no *jurisdictional* bar to consideration of the question. Neither are the Federal courts bound by decisions or findings of the State courts. This Court has, and the Court of Appeals had, the constitutional power to inquire whether the state law and state process, as construed and applied, has afforded Petitioner due process and equal protection of the law (*Hebert v. Louisiana,* 272 U.S. 312, 316; *Buchalter v. New York,* 319 U.S. 427, 429); and such an inquiry and decision cannot be foreclosed by the prior finding of the State

court; the Federal court will independently examine the facts and reach its own conclusion. (*Norris v. Alabama*, 294 U.S. 587, 590; *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 659; *Niemotko v. Maryland*, 340 U.S. 268, 271.) As decisively held by this Court in *Reece v. Georgia*, 350 U.S. 85:

> "We have jurisdiction to consider all the substantial federal questions determined in the earlier stages of the litigation (citing cases), and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case. (Citing cases.)"

The Court's "power to probe issues disposed of on appeal prior to the one under review is, in the last analysis, a 'necessary correlative' of the rule which limits it to the examination of final judgments." (*Erie v. Thompson*, 337 U.S. 163, 172.)

Significantly, this is the very first opportunity the Court has had to put the question at rest, for the reason that this is the very first time after years of litigation, that Petitioner has succeeded in getting all the State court records and other evidence on which the question is based before the Federal courts.

It should be noted (1) that Judge Goodman in the District Court did not and would not even consider the question, and (2) that actually the three judge panel of the Court of Appeals did not decide the question. Judge Lemmon, although first concurring in the bare majority opinion of Judge Hamley, then, in that later memorandum opinion of his own, emphatically denied the Appellate Court had any jurisdiction to

consider the question (a matter disposed of under B above) and made it clear that his sole concern was with getting the habeas corpus law changed to accord with his personal views of what the law should be, and, in the process, with getting Petitioner promptly put to death.

Judge Hamley's opinion (no longer truly a majority opinion in view of the position subsequently taken by Judge Lemmon) assumes, "without deciding" that the question might be considered. But the opinion then avoids deciding a basic phase of the question with the erroneous statement: "There is here no contention that appellant was denied a right which is customarily accorded to other convicted persons. Had such a showing been made, a serious constitutional question would be presented," citing *Griffin v. Illinois,* 351 U.S. 12, 18.

But Petitioner does contend that he was denied a right which is not only "customarily" but *"mandatorily"* accorded to other convicted condemned persons in California. In all other cases in the state heard under the automatic appeal law and governing rules there has been, *without exception,* a full appellate review upon a complete, jurisdictionally prepared and unchallenged record. In this one case—and this one only—there has been a lesser review, upon an admittedly incomplete, in effect uncertified, and challenged record, prepared by "human ingenuity," with Petitioner being given no opportunity to defend against the use of the record or having any voice in its preparation and settlement. Equal protection? Here there

is neither equality nor protection. Justice (if it can be so called) cannot, under our Federal Constitution, be administered with so unequal a hand. (*Yick Wo v. Hopkins,* 118 U.S. 356; see *Dowd v. Cook,* 340 U.S. 206, 210; *Cochran v. Kansas,* 316 U.S. 255.)

By taking judicial notice of its own records (*Dimmick v. Tompkins,* 194 U.S. 540, 548), the Court will find that not only did Petitioner expressly allege a denial of due process and equal protection in the instant petition, with regard to the procedures employed to prepare the transcript, but that he repeatedly has pressed his claim in the earlier litigation. (See, e.g., No. 239 Misc., Oct. Term, 1953, p. 19 of the petition for certiorari.) ["California has persisted in denying to Petitioner that type of appeal accorded all others similarly situated"], and pp. 53-64 of the same petition, where the contention is there spelled out.

C. The Guides for Decision and the Reasons Petitioner Is Entitled to Relief.

The affirmative reasons Petitioner is entitled to relief are succinctly set out in Chief Judge Denman's October 18, 1956, dissenting opinion (R. 281-285, Vol. I; 239 F. 2d at 219), his dissent from denial of rehearing (R. 289, Vol. I; 239 F. 2d at 221); and his subsequently filed memorandum opinion answering Judge Lemmon (R. 295-297, Vol. I; 239 F. 2d at 223).

Judge Hamley's opinion concedes that the record was prepared under what is mildly termed "unusual circumstances" but asserts this "called only for the exercise of a sound discretion in adopting procedures

adequate to meet the special situation." The claim that such a "sound discretion" was employed or that the procedures were "adequate to meet the special situation" is thoroughly refuted by the record.

Moreover, this Court has held that "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." (*Roller v. Holly*, 176 U.S. 398, 409.) "The law itself must save the parties' rights, and not leave them to the discretion of the courts as such." (*Louis. & Nash. R. R. v. Stock Yards Co.*, 212 U.S. 132, 144.) In determining their adjective as well as substantive law, State courts must accord the litigant due process of law. (*Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682.) And the essential elements of due process of law are notice and *adequate opportunity* to defend (*Louisville etc. R. Co. v. Schmidt*, 177 U.S. 230, 236; *Simon v. Craft*, 182 U.S. 427, 436.) But here Petitioner was given *no* opportunity to defend against the use of the disputed transcript, although the California Supreme Court placed the burden of proving that transcript's invalidity and inadequacies squarely upon him. That Court stated (35 Cal. 2d at 462):

> ". . . We perceive no legal impropriety and no unfairness in placing on an appellant in the situation of Chessman the burden of showing either prejudicial error in the record or that the record is so inadequate that he is unable to show such error."

But how, conceivably, could Petitioner have carried the burden of proving the record was so inadequate it

foreclosed him from showing prejudicial error or convictions obtained in violation of fundamental constitutional rights, unless granted a *hearing* and the opportunity to present his proof?

To satisfy due process, this Court repeatedly has held that the citizen *must* have "reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights affected by it." (*Dohany v. Rogers*, 281 U.S. 362, 369 and cases there cited.)

As the Court tersely stated the proposition in *Snyder v. Massachusetts*, 291 U.S. 97, 116:

> "A defendant who has been denied an opportunity to be heard in his defense has lost something indispensible, however convincing the ex parte showing."

Without opportunity to be heard, there is no opportunity to defend. Without opportunity to defend, the power of the State becomes absolute. Here unbridled discretion was substituted for lawful process, with the result that Petitioner was shut out of court while a hybrid record on which his life would be declared forfeit was created, settled, and approved.

Yet, speaking for this Court in the recent case of *Sikes v. Alabama*, 1 L. Ed. 2d 246, 251, Mr. Justice Frankfurter made it clear that

> ". . . the Fourteenth Amendment has placed limitations upon the discretion, unbridled for all practical purposes, that belonged to the states prior to its adoption, and, more particularly, confines their

freedom of action in devising criminal procedures."

"Nothing is better established," as Chief Judge Denman noted in his Court of Appeals dissenting opinion "than that the due process of the Fourteenth Amendment requires that a party affected by the decision of a trial (or hearing) shall be given notice and an opportunity to paticipate in it and that, if this be denied, the decision made in his absence, must be set aside." (239 F. 2d at 219, citing *Standard Oil Co. v. Missouri,* 224 U.S. 281; *Saunders v. Shaw,* 244 U.S. 317, 318; *Powell v. Alabama,* 287 U.S. 45, 67; *Snyder v. Massachusetts,* 291 U.S. 97, 105; *Ohio Bell Tel. Co. v. Public Utilities Comm.,* 301 U.S. 292, 304; *Railroad Comm. v. Pacific Gas,* 302 U.S. 388, 393; See also *Shelly v. Kraemer,* 334 U.S. 1, 16.)

The majority opinion of the Court of Appeals states that, "while the substitute reporter testified at the settlement hearing, he did not appear as a witness for or against the accused." (239 F. 2d at 218.)

This is indulging in too nice and too dangerous a fiction.

The witness was produced by the prosecutor. His payment for preparing the transcript under his contract with the Los Angeles County Board of Supervisors depended upon approval of the transcript by the trial court. Petitioner had directly challenged both the accuracy of the transcript and the ability of the witness to transcribe the deceased reporter's old-style,

three-position, shaded Pitman shorthand notes. Further, Petitioner had expressly motioned to be produced, to consult with the attorney who had sat with him during the trial as "legal advisor," to test the ability of the witness to decipher the notes, and to offer the proof he had in support of his claim that the transcript was prejudicially incomplete and inadequate. As well, the California Supreme Court subsequently recognized that a determination of whether one reporter can transcribe another reporter's shorthand notes "is essentially a question of fact to be determined in each case in which it may arise." (35 Cal. 2d at 461.)

But, nevertheless, the trial court refused to order Petitioner produced although it earlier had informed Petitioner "that there can and will be a *hearing* for the settlement of the transcript," and the prosecutor had sworn to the California Supreme Court that Petitioner would be produced and allowed to present his objections to the transcript "in court."

In law, "the term 'hear' implies that someone is before the Court to speak." "Hearing" is an essential element of due process of law, and *"it contemplates a listening to facts and evidence."* (39 C.J.S. p. 875.) In this due process sense no "hearing" was held, although it was crucial that Petitioner be present and have the Court listen to his facts and evidence. He was the one with a knowledge of the facts, the one who knew what evidence was available to support his position.

At 239 F. 2d 205, 218, the Court of Appeals states that Petitioner could "have been represented by counsel, had he so chosen."

How?

Petitioner had asked to confer with his "legal advisor" at the original trial, had been led to believe he would be produced at the settlement hearing and formally had motioned to be so produced. He never waived his right to counsel at the settlement proceedings. He never was offered counsel. He never knew he would not be produced until he learned the settlement proceedings already had been conducted and concluded.

In holding against Petitioner's right to be present when this hybrid record was settled, the Court of Appeals places great reliance upon the asserted fact that these proceedings were "a part of the appeal procedure, and not a part of the trial at which appellant's conviction was obtained." (239 F. 2d at 218.) This is a *non sequitur*. Whether Petitioner has been denied due process must be tested by *all* proceedings had in the State Courts. (*Frank v. Mangum*, 237 U.S. 309, 327; *Cole v. Arkansas*, 333 U.S. 196, 201.)

To conform to due process of law, Petitioner was entitled to have the validity of his convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial Court. (*Cole v. Arkansas, supra*, at 202.) This must carry with it the corollary right to prove the invalidity and inadequacy of a trial record prepared by "human in-

genuity", and in California the trial Court alone has power to hear and decide questions relating to such a record.

The California Supreme Court's failure to guard and enforce Petitioner's Constitutional rights in the transcript matter—by refusing to order a hearing in the trial Court—is not answered by a substitution of the rationale that where "The record *appears* to contain ample evidence to support the verdict" (35 Cal. 2d at 463), "it is adequate to permit us to ascertain whether there has been a fair trial and whether there has been a miscarriage of justice." (35 Cal. 2d at 462.)

The Court of Appeals is grievously in error in stating that the only wrongs Petitioner claims to have been done to him by the usage of the present transcript are the alleged omission of "an erroneous and prejudicial instruction and an erroneous and prejudicial comment to the jury" by the trial judge. (See 239 F. 2d at 218.) Petitioner repeatedly has attacked the accuracy of the *entire* transcript; time and again, beginning in the trial Court, he specifically has complained that missing from the transcript altogether are sections showing he was denied the right to subpoena certain witnesses, denied representation by counsel of his choice or the alternative right to prepare his own defense, and hence forced to trial unprepared; that the transcription of testimony relating to the purported oral confession is so incomplete and garbled that it kept Petitioner from showing he had been convicted by use in evidence over his objection of a coerced con-

fession; that much of the gross misconduct of the prosecutor has been "smoothed over", or not transcribed; that all of the cross-examination of one capital offense witness is missing and the testimony of other capital offense witnesses is so garbled that Petitioner was prevented from establishing an appeal, particularly in view of the amendment of Section 209 of the California Penal Code, that the acts of the perpetrator did not constitute violations of that section, and hence that Petitioner's death penalty convictions must be reversed, etc. (See, e.g., Pet. Ex. 11: "Defendant-appellant's list of inaccuracies and omissions in the record" attached to the motion made to the trial Court; a similar list filed in the State Supreme Court in Crim. 5006, Pet. Ex. 1; Petition for Certiorari in No. 239 Misc., Oct. Term, 1953, pp. 13-20; Petitioner's testimony in the District Court, H.R. 617-618, 629, 633-636, 649-651.)

But not only did the California Supreme Court refuse to order a hearing in the trial Court on the question of the assailed adequacy of the record, it further refused to order that record augmented to include proceedings had at the trial in which inhered federal constitutional questions on the ground those proceedings could not, in its opinion, lead to a reversal. (35 Cal. 2d at 466.) But that Court could not properly avoid review by this Court of its disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact. (*Williams v. North Carolina*, 325 U.S. 226, 236.) It is not simply a question of state procedure when a State Court of last resort

closes the door, as here, to *any* consideration of claimed denial of federal rights. (*Young v. Ragen,* 337 U.S. 235, 238.). State procedure does not bind this Court when so unfair and unreasonable in its application to one asserting a federal right as to obstruct it. (*Central Union Tel. Co. v. City of Edwardsville,* 269 U.S. 190, 195.)

While the right of appeal may not be an essential of due process, "due process [must have] already been accorded in the tribunal of first instance". (*Ohio v. Akron Park District,* 281 U.S. 74, 80.) Yet here, denied a trial Court hearing, Petitioner was barred from proving due process had *not* been accorded him in the tribunal of first instance. Here, moreover, Petitioner was *forced* to appeal on an unauthenticated record, prepared by "human ingenuity" and given no opportunity to defend against its use. However, California's mandatory appeal procedures were designed to protect Petitioner's rights, not destroy them—and him—through an act over which he had no control, the death of the Court reporter.

In practical effect, Judge Hamley's opinion holds that because the state did produce, settle and use a record of sorts on appeal, rather than no record at all, Petitioner can ask and due process and equal protection may demand no more.

This is necessarily to say, under the undisputed facts of this case, that it is all right to produce a record by "human ingenuity," in contravention of all established, controlling and settled state law; to dele-

gate, not to some impartial party, but to the prosecutor, the unsupervised authority to select a substitute reporter to prepare such a record of the trial proceedings; to let the prosecutor select his own uncle-in-law, and keep this fact carefully concealed from the trial judge, the Petitioner and the reviewing Court; to let the prosecutor and the substitute reporter consult on the transcription out of Court; to grant the substitute reporter unlimited time to prepare the record; to let him talk to detectives—key trial witnesses for the prosecution—out of Court, use these talks as a basis for reconstructing their testimony, at the suggestion of the prosecutor, and keep this fact from the trial judge, the Petitioner, and the reviewing Court; to let the substitute reporter prepare the transcript in rough draft form, the rough draft never being seen by the trial Court or Petitioner, although Petitioner formally had asked to be furnished a copy, and then, also out of Court, to permit the prosecutor to "check" the draft before it was copied in final form; to let the prosecutor swear to the reviewing Court that Petitioner (representing himself and held at a state prison) would be produced in Court when the record was settled and never let the trial judge know of this sworn statement;[8] to pay the reporter more than three times the statutory fee for his work; to hold hearings to create and settle the record with neither

[8]The statement bordered on, if it did not actually involve, perjury. See Calif. Pen. Code, section 125: "An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false." Certainly the statement amounted to a fraud upon the California Supreme Court.

Petitioner nor counsel representing him present;[9] to have Petitioner's motions to be present and challenge the transcript and the ability of the substitute reporter to transcribe the dead reporter's notes denied by the reviewing Court without prejudice and ignored by the trial Court; to proceed to have witnesses testify and settle the transcript in the absence of Petitioner; to have the trial judge "approve" such a record without testing the competence of the substitute reporter to decipher the dead reporter's shorthand notes, although the trial judge knew the local Superior Court Reporters' Association officially had gone on record that other Court reporters had examined the notes and found them to be indecipherable in material part; to have the trial judge let the prosecutor use his Court and its processes to keep Petitioner out of Court and foreclose a state Supreme Court-ordered hearing on the validity and adequacy of the record; to have this disputed record accepted by the reviewing Court and used as a basis for affirming death and other judgments, although it was not certified to be complete and correct as required, but only correct to the best of the substitute reporter's ability; and to never allow Petitioner to defend against the use of that transcript or to establish, as he claimed, that missing from it, or garbled in the transcript of it, were sections in which it should have affirmatively appeared

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[9]Where the accused is defending himself, this Court has held that the trial judge must be particularly alert to see that the accused is not overreached and taken advantage of. (*Gibbs v. Burke*, 337 U.S. 773, 781.) But here, by not producing Petitioner or offering him counsel when the record was settled, the trial judge himself was the person responsible for Petitioner being overreached and taken advantage of.

that Petitioner had been convicted in violation of fundamental constitutional rights."

This, to say the least, is a singular definition of due process and equal protection of the law. As stated by the late Mr. Justice Jackson in a separate opinion in *Brown v. Allen*, 344 U.S. 443, 446: "But I know of no way that we can have equal justice under law except we have some law." The use of "human ingenuity," by the prosecutor, whose avowed purpose was to see Petitioner executed, is certainly no substitute for law.

Yet, in his brief opposing the present petition for certiorari, Respondent argued that "This procedure was reasonable, and in no way discriminatory as to Chessman." How, though, in point of simple fact, could it have been more discriminatory, more inherently unfair?

It does violence to the sense of fair play and justice inherent in the Due Process of Law clause of the Fourteenth Amendment to conceive of and solemnly sanction a hearing—upon which a man's life depends—where evidence is taken and issues of fact determined, with the Defendant neither present in person nor represented by counsel, while at the same time his adversary—the State—is thoroughly and ably represented and while, further, counsel for the State is permitted to use the trial Court and its processes to keep the Defendant out of Court.

CONCLUSION.

[Rule 40-1(h).]

The Court should:

1. Reverse, with appropriate directions (as in *Dowd v. Cook*, 340 U.S. 206), the judgment of the Court of Appeals affirming the order of the District Court discharging the writ of habeas corpus previously granted.

2. Set aside the State trial Court's order creating, settling and approving the trial transcript, as well as the California Supreme Court's affirmance—based on that transcript—of the judgments of conviction imposing the two sentences of death and the fifteen sentences of imprisonment upon Petitioner.

3. Hold that, in the circumstances of this case, Petitioner had a constitutional right under the Fourteenth Amendment to be personally present and represented by counsel at, and to participate effectively in, the proceedings in the State trial Court to create and settle the uniquely prepared reporter's transcript to be used on the automatic appeal (including the right to cross-examine witnesses produced by the State, to test the challenged ability and competence of the substitute reporter, and to produce witnesses and evidence in support of his claims the shorthand notes of the deceased reporter were and are indecipherable in material part and that the Fraser transcript was and is grossly incomplete and inaccurate).

4. Rule, in the alternative, (1) that Petitioner is presently entitled to be discharged from custody, or

(2) that the State trial Court must promptly conduct a new hearing—under the conditions set out in the just above paragraph—to determine the validity and adequacy of the record, and that Petitioner must be discharged from custody if it is established that the deceased reporter's old-style, three-position shaded Pitman shorthand notes are in fact not decipherable in material part and that no true, complete and correct transcript of the trial can be prepared and certified from them.

Dated, April 22, 1957.

Respectfully submitted,

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ROSALIE S. ASHER,
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IN THE

Supreme Court of the United States

October Term, 1956

No. 893
(formerly No. 566 Misc.)

CARYL CHESSMAN,
Petitioner,

vs.

HARLEY O. TEETS, Warden of the California State Prison, San Quentin, California,
Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This brief is being filed by the Petitioner pursuant to the order of this Court made and entered on April 8, 1957, paragraph three thereof, also pursuant to suggestions made by members of the Court during oral argument on May 13, 1957.

I. Petitioner did expressly seek the order of the trial court to be produced at the settlement hearing conducted by it.

Petitioner *did** expressly and formally request the trial court to order his physical presence at the hearing on the settlement of the transcript. (See Pet. Brief, pp. 26-27). This was done in Petitioner's "Affidavit Responsive to Reporter's Transcript of Proceedings Re Filing of Reporter's Transcript on Appeal" (Pet. Ex. 17). In this affidavit—directed to and filed in the trial court in Los Angeles—the Petitioner clearly and unequivocally requested that he be present at any hearings for the settlement of the transcript.

And Judge Fricke was familiar with this request. When he proceeded to settle the trial transcript in Petitioner's absence, he did so with full knowledge that Petitioner desired and had asked to be present. He testified without qualification in the District Court, before Judge Goodman, "Yes, there *was* such a request made" by Petitioner to be present (H.R., p. 833, Vol. X).

Even prior to this time, in September of 1948, Petitioner had filed his "Affidavit in Support of Request for Prompt Delivery of Trial Record and Need Therefor" (Pet. Ex. 1, Jacket 11), wherein he asked for delivery to him of the "raw" reporter's transcript and made known to the trial court his right to be present

> "during all phases of the proceeding affecting his substantial rights, and when he is acting in propria personam."

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* Emphasis has been supplied by Petitioner throughout this brief, unless otherwise indicated.

II. Petitioner has not waived either his right to be personally present or to be represented by counsel at the trial court settlement proceedings.

Respondent asserts that Petitioner's claim he was constitutionally entitled to the assistance of counsel at the settlement hearings is "a contention never presented for consideration to the State Court" and hence, Respondent argues, must be deemed to be waived (Resp. Brief, pp. 36-38). "It appears here," Respondent continues, citing an impressive number of cases to the effect that state remedies must be exhausted before the Federal courts may entertain a petition for *habeas corpus*, "that Chessman has adopted a new theory with reference to due process and the right to counsel which was not presented to the California Supreme Court nor to the federal courts" (Resp. Brief, p. 38).

The contention that Petitioner was unconstitutionally deprived of assistance of counsel *has* been made to both the California Supreme Court and the lower federal courts. It was made to the California Supreme Court in a petition for *habeas corpus*, summarily denied (Pet. Ex. 1; records of *In re Chessman*, Crim. No. 5632). When that denial was brought here for review, this Court denied certiorari "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court" (*Chessman* v. *Teets*, No. 285, Oct. Term, 1954, 348 U. S. 864). Then, in the resultantly filed petition for *habeas corpus* (upon which this certiorari is based) Petitioner expressly alleged (as set out in Petitioner's brief at p. 41) both that "Petitioner was deprived of the right to be

present at the hearing of the settlement of the reporter's transcript on said automatic appeal" and that "said trial court * * * in connection with the matter of the settlement and approval of the reporter's transcript on appeal, and the hearings had thereon, failed, neglected and refused to afford representation to defendant, either by personal appearance of your Petitioner, *or by the appointment of a competent attorney-at-law to represent your Petitioner at these vital proceedings in connection with the settlement of said reporter's transcript* * * *".

Not only is it true that Petitioner never expressly waived his right to counsel in any of the post-trial proceedings for the settlement of the record, but he was never informed by the trial court that he would not be allowed to appear *in propria persona* nor, that in lieu thereof he would be allowed the right to be represented by counsel. It is the contention of Petitioner that it was the duty of the trial court, since it refused to allow Petitioner to appear in person, to see that Petitioner's rights were fully protected during the settlement hearings by and through the services of an attorney representing Petitioner, and the failure of the trial court in this respect is unequivocal and uncontradicted. In such circumstances, where the accused is defending himself, the trial judge must be particularly watchful to see that he is not overreached nor taken advantage of (*Gibbs* v. *Burke*, 337 U. S. 773, 781).

III. Petitioner did suffer demonstrable prejudice by the admitted refusal of the trial judge to produce Petitioner and allow him to participate effectively in, and to be represented by counsel at, the hearings conducted to create, settle and approve the trial transcript to be used on the automatic appeal.

Respondent demands rhetorically, as though by the mere asking of the question he entirely demolishes Petitioner's claim of denial of due process:

> "Is it not then incumbent upon Chessman to demonstrate to this Court that in some heretofore unexplained manner his personal appearance at the trial transcript settlement proceedings would have enabled him to do more than or other than that which he did? Is it not further incumbent upon Chessman to demonstrate to this Court that there were other objections not made by Chessman in writing which could have been made with material difference to the case upon appeal?" (Resp. Brief, p. 23).

Petitioner repeatedly has sought to demonstrate in the past that he was prejudiced by Judge Fricke's admitted refusal to produce Petitioner and allow him to participate effectively in, and to be represented by Counsel at, the hearings on the settlement of the transcript. Petitioner could have done what he sought by his motion to the trial court and quoted at page 26 of Petitioner's Brief. He could have established that Stanley Fraser misrepresented his ability to read the deceased reporter's shorthand notes and that those notes are in fact undecipherable in material part. He could have produced other official shorthand re-

porters who had studied the notes and "reached the conclusion that many portions of the same will be found completely indecipherable" (Pet. Brief, p. 22). He could have produced defense witnesses at the trial who were prepared to testify that their testimony as transcribed was glaringly inaccurate. He could have produced trial jurors and others in support of his claim the trial judge had prejudicially instructed the jury to return the death penalty. Given counsel and an opportunity to investigate, he could have produced Mrs. Eva Hoffman and other witnesses and evidence to show that, at the very time Fraser was engaged in working on the transcript, he was so intoxicated as to be mentally and physically incapable of doing such work with any degree of competence; that he was addicted to the excessive use of alcohol, had a long record of arrests for being drunk, and was arrested while he was supposedly actually engaged in the preparation of the record (see Pet. Brief, pp. 33-34).

Petitioner further could have brought out that Fraser was the uncle-in-law of the prosecutor, J. Miller Leavy, a fact kept concealed from Judge Fricke (H.R. 170, Vol. V; 452, Vol. VII); he could have brought out that, at the suggestion of Leavy, Fraser had conferred with two prosecution witnesses, Los Angeles detectives Leland Jones and Colin Forbes, about Fraser's rough draft transcription of their trial testimony, thus permitting their testimony to be reconstructed not only in the absence of petitioner but out of court and secretly (H.R. 592, Vol. VII; 870-871, Vol. X; 396-397, 417-420, Vol. VI; 833, 837, Vol. X); he could have established that Fraser did get Leavy's "corroboration, his ideas, his recollection in places where I had difficulty" (H.R. 339).

Most of the evidence above was concealed from the trial court and from petitioner until the hearings in the District court and was never passed on by the California courts.

Referring particularly to the District Court record, Fraser testified as follows:

That he took his notes to Deputy District Attorney Leavy's home to work on them (Rep. Tr., District Court hearing, p. 321);

That he did not tell Judge Fricke of his relationship to Deputy District Attorney Leavy (*Id.*, p. 322);

That he destroyed the rought draft transcriptions of Perry's notes (*Id.*, p. 329);

That he wanted Deputy District Attorney Leavy's corroboration of ideas, recollection in places where he had difficulty, and sometimes his memory (*Id.*, p. 339);

That he talked to Lt. Jones of the Los Angeles Police Department and Colin Forbes, another police officer, about their testimony in the case (*Id.*, p. 417);

That he wanted to get all the light he could (*Id.*, p. 418);

That Leavy may have been present when he talked to Forbes (*Id.*, p. 419).

None of the above was known to Petitioner until it was brought out in testimony at the District Court hearing as appears by the Petitioner's own testimony therein (*Id.*, pp. 591-592, 595).

Judge Fricke testified in the District Court that if he had known Fraser had seen Jones and Fraser, the matter *would* have been raised at the time of the settlement (H.R. 833, 837, Vol. X). Also Judge Fricke testified before the District Court that *"I wouldn't have hesitated for a moment in revoking any proceedings had up to that time*

if I had found out about it afterwards," referring to Fraser's alleged incompetency as a result of his chronic addition to alcoholic beverages; *"If I had even heard the rumor, I would certainly have gone out and made an investigation to ascertain whether there was any foundation for it or justification for it"* (H.R. 890, Vol. X).

Also having in mind the question asked by this Court as to the portion of the testimony of Leland Jones and Colin Forbes which appears in the first 646 pages as compared to that which appears later, the record shows that these two witnesses testified as follows, references being to the trial transcript:

Colin Forbes: pages 202-206; 462-472; 567-569; 802-809; 831-833; 1008-1011; 1220-1225; 1371-1380; *1436-1492* (which Petitioner in his list of inaccuracies specifically challenged). * * * It is Forbes' testimony after page 569 (*i.e.* in the Fraser portion of the record) which is challenged because it deals with Petitioner's alleged confession.

Leland B. Jones: pp. 473-502.

In addition, Petitioner complained about, and could have offered evidence of, the smoothing over of the People's arguments, opening and closing, and the dropping (in the transcript as settled) of prejudicial remarks of the prosecutor and trial judge.

It can be demonstrated mathematically that Petitioner has been materially prejudiced by Fraser's purported transcription of Perry's notes of the trial. Transcribing his own notes before his death, Perry dictated 593 pages from 15 hours and 45 minutes of trial, for an average of 37.7 pages per trial hour. Transcribing Perry's notes, Fraser prepared 1194 pages from 34 hours and 20 minutes of trial, for an average of 34.8 pages per trial hour. Thus,

multiplying 34.33 times 2.9, it will be seen that Fraser has "lost" 99.557 pages of record in his transcription. Considering the serious nature of the due process rights involved, this is too great a loss to be ignored.

IV. Whether Petitioner has been denied rights and fundamental safeguards guaranteed him by the Fourteenth Amendment is to be determined by the Court from an independent examination of the evidence before it, not by reliance upon prior negative decisions of State courts nor by adoption of Respondent's casuistic legal philosophy and ingenious but untenable and obstructive legal theories.

Respondent does not deny that "this is the very first time, after years of litigation, that Petitioner has succeeded in getting all the State court records and other evidence on which the question is based before the Federal Courts." (Pet. Brief, p. 43).

And here "the existence of an asserted Federal right * * * depends upon the appraisal of undisputed facts of record," thus leaving the Court "free to reexamine for [itself] whether the asserted right is to be sustained" (*Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659).

The guiding and authoritative rule, which Respondent would have the Court ignore, is found in *Norris* v. *Alabama*, 294 U. S. 587, 590, and has been repeatedly applied in later cases:

> "When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms,

but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination will be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured. (Citing cases.)"

A. The significance of the decisions of the State and lower federal courts

So far as is relevant under this heading, all that *People* v. *Chessman*, 35 Cal. 2nd 455, shows is a *denial* of Petitioner's motions for judicial hearings in the trial court that he might test the questioned ability of the substitute reporter and, by testimonial and physical evidence, prove the gross inadequacies and constitutional infirmities of the uniquely prepared trial transcript.

All that *People* v. *Chessman*, 38 Cal. 2nd 166, shows is that the judgments of conviction, *with review based upon that transcript*, should, in the opinion of the California Supreme Court, be affirmed. Having accepted the transcript (without giving Petitioner any opportunity to defend against it), the California Supreme Court, on hearing the appeal, was bound by it (*People* v. *Mooney*, 105, 107-108; and see Point VI below).

In re Chessman, 43 Cal. 2nd 391, deals with the denial of a motion made by the California Attorney General to set aside and vacate a stay of execution granted by Mr. Associ-

ate Justice Carter of the California Supreme Court to permit petitioner to make prompt application for certiorari to this Court (43 Cal. 2nd 296), which was done with favorable results (*Chessman* v. *Teets*, 348 U. S. 864). The only significance of the opinion in 43 Cal. 2nd 291 is the fixed determination entertained by a majority of the State Supreme Court to see that Petitioner was not given a hearing on his claims dealing with the transcript. By way of contrast, see the separate and opposing view expressed by Mr. Justice Carter in *In re Chessman*, 43 Cal. 2nd 408.

Chessman v. *People*, 205 F. 2nd 128, and *Chessman* v. *Teets*, 221 F. 2nd 276, deal only with fragmented aspects of the question, and the facts on which the question was based were not before the Appellate Court. The latter case relied heavily on the former and was reversed by this Court in *Chessman* v. *Teets*, 350 U. S. 3. *Chessman* v. *Teets*, 239 Fed. 2nd 205, is the decision and opinion of the Court of Appeals presently before this Court on certiorari. The holdings of the majority and dissenting opinions are considered at pages 41-44, 45-46, 48 *et seq.* of Petitioner's Brief.

There is nothing in these cases to justify Respondent's claim, in effect, that this Court might properly deny relief without reference to the facts because "the courts have displayed a steady unity in refusing (petitioner's) claims." Indeed, these cases, as well as *In re Chessman*, 128 Fed. Supp. 600, and *Chessman* v. *Teets*, 138 Fed. Supp. 761, present the most persuasive reason conceivable why this Court should decide the question on an independent examination of the evidence.

B. The "meaning" of previous denials of certiorari

Respondent would have it that "the denials of certiorari by this court are of persuasive influence and grounds for denial again" (Resp. Brief, p. 36). No authority is—or can be—cited in support of the proposition.

Respondent relies on a quotation from the late Mr. Justice Jackson to the effect that the minimum meaning of a denial of certiorari "is that this Court allows the judgment below to stand with whatever consequences it may have under the doctrine of *res judicata* as applied by state or Federal courts" (*Brown* v. *Allen*, 344 U. S. 443, 543, separate opinion of Justice Jackson). In the abstract that is true. But it contributes nothing to the force of Respondent's contention. Justice Jackson was speaking for himself. Mr. Justice Frankfurter, speaking for the majority in the same case, concluded that "in habeas corpus cases, as in others, denial of certiorari cannot be interpreted as an 'expression of opinion on the merits' " (*Brown* v. *Allen, supra,* at p. 497). Or, as was stated in *U. S. ex rel. Smith* v. *Baldi,* 344 U. S. 561, 565, decided the same day as *Brown* v. *Allen,* "Our denial of certiorari in habeas corpus cases is without substantive significance."

Respondent also asserts in the heading to the point that "The repeated denials of certiorari are not without meaning" (Resp. Br., p. 36). This is true, but it is not in the way contended for.

Chessman v. *California,* 340 U. S. 840, sought review of the denial of a petition for *habeas corpus* by the California Supreme Court, as well as indirectly, of *People* v. *Chessman,* 35 Cal. 2nd 455. *Chessman* v. *California,*

341 U. S. 929, sought review of a denial by the District Court of a petition for *habeas corpus* and refusal of leave to file a complaint in equity *in forma pauperis*, with the Court of Appeals refusing to allow an appeal on either proceeding. In both cases, it affirmatively appeared that Petitioner's appeal on the merits was still pending. Thus the meaning of the denials was simply that the Court was giving effect to 28 USC sec. 2254; Petitioner had not exhausted his state remedies.

Chessman v. *California*, 343 U. S. 915, sought writs of certiorari to review the affirmance of the judgments in *People* v. *Chessman*, 38 Cal. 2nd 166, and the denial of a petition for *habeas corpus*. Earlier the State Supreme Court had ruled that the death of the court reporter or the inability to prepare a trial transcript was not legal grounds for granting a new trial (35 Cal. 2nd at 460). This was an adequate non-federal ground, and consequently, so far as questions were raised concerning the transcript, the Court was precluded from reviewing on the authority of *Stembridge* v. *Georgia*, 343 U. S. 541, 547-548.

Chessman v. *California*, 346 U. S. 916, is not conclusive, because this Court later considered another petition for certiorari and, although denying same, did so "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court" (348 U. S. 864). Since, including the present time, the Court has twice granted certiorari, Petitioner cannot believe it would have done so if it felt previous denials and the procedural morass in which Petitioner had been caught were, as Respondent contends, grounds for again slamming the door on Petitioner.

V. There is no merit or substance to Respondent's contentions that because the State managed to secure death penalty convictions Petitioner thereby became a dangerous man and hence the denial of constitutional safeguards was justified; that because Petitioner is assertedly a literate person familiar with the law he is not entitled to its protective benefits; and that because Petitioner allegedly "forced" the trial court to proceed as it did he may not be heard to complain of the methods and procedure employed to prepare, settle and approve the trial transcript used on appeal to affirm the death penalty and other judgments.

Respondent advances the theory that the balance of public safety required that Petitioner be not produced at the settlement hearings. Yet, aside from an implied reference to his convictions, Respondent makes no showing that such theory had any basis in fact. Rather than looking to such theoretical apprehensions, attention should be given to the fact that Petitioner conducted his own trial without hint of incident of such sort; and that, since his confinement in Death Row, he has appeared before the California Superior Court in Marin County, conducting his own legal proceedings, and with his counsel in the United States District Court, and in neither instance can Respondent point to one untoward incident. Moreover, this argument was never suggested to Judge Fricke nor relied upon by him. It must also be noticed that the first time the matter of the preparation of the transcript was brought to the attention of the trial court was on motion for new trial on

June 25, 1948, at which time Petitioner was present; and at that time, Judge Fricke, had he been so advised, could have arranged for Petitioner to be retained in custody in Los Angeles County, thus obviating the necessity of the 400 mile journey from San Quentin, mentioned by Respondent in oral argument.

With reference to the argument made by Respondent that Petitioner could and should have proceeded under Rule 36(b) instead of standing on his rights as prescribed by Rule 35, the following is a complete reply.

Rule 36(b) of the California Rules on Appeal is permissive as to the appellant, as was recognized in *People* v. *Chessman*, 35 Cal. 2nd 455; but Rules 35(b) and 33(c) are mandatory. If a settled statement is allowed, then Rule 7 is brought into play, and there is required notice, a hearing, and participation by the parties.

But, the Rules aside, Petitioner was never given an opportunity to offer such. Consider the restricted time. Consider his situation, confined in a death cell. Above all, consider that on June 25th, 1948, at the new trial proceedings, Judge Fricke had stated that there was nothing to show that a verbatim transcript could not be prepared. As the testimony before Judge Goodman shows, neither Judge Fricke (H.R., pp. 846-866) nor Petitioner (*Id.*, 591-595) knew of the method employed by Fraser in attempting to decipher and transcribe Perry's notes.

The ineffectiveness of Respondent's statement in its brief (p. 17) relating to Petitioner's being on notice of the possibility of the death of the court reporter is apparent on its face. In reply to this point, Petitioner desires merely to ask that if he was charged with such notice, was not, then, the trial judge likewise charged with notice of *his* responsibility in such a situation?

VI. Petitioner has not conceded and does not concede the accuracy of the transcript, and the question of due process of law is applicable to that portion of the transcript prepared by Mr. Perry before his death.

Having accepted the trial transcript, the California Supreme Court, on hearing the appeal, was bound by it. (*People* v. *Mooney,* 176 Cal. 105, 107-108.) So was petitioner. Matters not in that record could not be considered on appeal. (*People* v. *Ruiz,* 103 Cal. App. 2nd 146, 150, and cases cited; *People* v. *Outcault,* 90 Cal. App. 2nd 25, 28; *El Rio Oils* v. *Pacific Coast Asphalt Co.,* 95 Cal. App. 2nd 186, 190.)

Thus Petitioner was confronted with a dilemma. He insisted the transcript was prejudically incomplete and inaccurate. But he was forced either to prosecute his appeal using the disputed transcript, or to lose the appeal—and perhaps his life—by default, as it were. He chose to prosecute the appeal, and did so with all the vigor he could command. At the same time, he made it plain to the court that he was *not* waiving his previous position as to the grossly inadequate character of the transcript and filed with his opening brief a petition for *habeas corpus* attacking that transcript (see Pet. Ex. 1: Appellant's Opening Brief on Appeal on the merits in Crim. No. 5006, pp. 131-133; Appellant's Closing Brief, pp. 78-82).

Now Respondent attempts to convert Petitioner's legal attack on the death penalty judgments, *restricted as it was to what is shown in the disputed transcript,* into a concession as to the accuracy of the testimony. It plainly appears

Petitioner was conceding nothing; he was simply doing what he had to do: took the evidence as he found it. His arguments for reversal *on the appeal* were restricted to whatever arguments could be based on the evidence appearing in the transcript, however inaccurate it might be. Respondent's argument is an attempt to mislead this Court and to prejudice it by reference to the sex crime testimony.

Respondent knows that Petitioner has consistently and vehemently maintained his innocence (see Petition for Writ of Certiorari, pp. 57-58). He knows that Petitioner insists he was misidentified, not identified. He knows that Petitioner was not claiming in the quoted portions of the briefs that *he, Petitioner*, had not kidnapped the female victims for a purpose other than robbery but was arguing what he believed the evidence showed as a matter of law with respect to the intentions of the *kidnapper*.

Respondent knows further that Petitioner asserts and has sworn that the entire cross-examination of Jarnigan Lea, who testified as to one of the death penalty counts, is missing from the portion of the transcript dictated by Ernest Perry before his death (see Pet. Ex. 11, p. 4 of the "List of Inaccuracies and Omissions in the Transcript;" 35 Cal. 2nd at 473). Petitioner also has claimed and asked for the opportunity to prove that other portions of testimony of prosecution witnesses, as dictated by Perry, are omitted from the transcript. In fact, the question of the completeness and in some instances the accuracy of the first 646 pages of the trial transcript are very much in issue.

VII. Difficulties the State might encounter in again bringing Petitioner to trial and convicting him present no competent argument why the relief sought, being otherwise proper, should be denied.

As Chief Judge Denman observed in certifying probable cause to appeal to the court below (R. 252-254, vol. 1): "Incidentally, it is quite likely that if Chessman had been present at the [settlement] hearing some eight years of appeals, petitions for *habeas corpus*, and more appeals might have been avoided." They almost certainly would have been avoided.

All that Petitioner has sought from the beginning, as the record shows, is a full, fair and decisive hearing on his contentions respecting the transcript, and in California the trial court alone has power to hear and decide questions relating to such a transcript. But that hearing is the one thing the State has refused to give him; even now, almost nine years later, it is the one thing counsel for the State strive desperately to avoid. They go so far as to urge that this Court should go outside of the record and consider the fact certain prosecution witnesses are either dead or unavailable (Resp. Br., pp. 44-45). But difficulties the State might encounter in again bringing Petitioner to trial and convicting him present no competent argument why the relief sought, being otherwise proper, should be denied. Petitioner will be confronted in equal or greater proportion with the same difficulties. His witnessess too have died or become unavailable. The State elected consciously to risk the hazards of a delayed hearing when it knowingly chose the course it continues to pursue.

It is one of the profound ironies of this case that Petitioner requested—and the trial court denied—a daily transcript (Pet. Ex. 1 Rep. Tr. on Appeal, in Crim. No. 5006, p. 54). Such a request is normally granted as a matter of course when a defendant is placed on trial for a capital offense. Petitioner was placed on trial for *three* capital offenses, plus fifteen other serious felonies. Still his request was rejected. Had it been granted, of course, the death of the court reporter after the trial would have created no problem. A transcript would already have been available, and the problem long since decisively resolved.

VIII. There was a clear failure of due process in this case when the proper tests for denial of due process of law are applied to the totality of relevant facts before the court.

Respondent states: "So far as the *power* of California to provide for the proceeding [and presumably the trial transcript] here utilized there can be no question. The only challenge, of course, lies to the question of the fairness of the procedure"—fairness in its due process sense (Resp. Brief, p. 29).

Petitioner agrees—and thus the merits may be reached. The issue is joined.

A trial transcript, of sorts, was prepared. Proceedings were had to settle it. Over Petitioner's objection, it was accepted by the California Supreme Court for use on the mandatory appeal (*People* v. *Chessman*, 35 Cal. 2nd 455, 218 P. 2nd 769, 19 A. L. R. 2nd 1084). Thus, since the California Supreme Court was acting within its jurisdiction,

whether as a matter of State law it decided the question of Petitioner's right to be present and participate in the settlement hearings, as well as the question of the validity and accuracy of the transcript, without giving Petitioner any opportunity to defend against it, correctly or incorrectly, justly or unjustly, consistently or inconsistently, its decision recognizedly finally decided these questions and defined Petitioner's rights under State law (*Hebert* v. *Louisiana*, 272 U. S. 312, 316).

But that decision left this Court with the unimpaired constitutional power, right and duty to inquire and decide whether the result reached, and the manner in which it was reached, has afforded or denied Petitioner due process and the equal protection of the laws (*Hebert* v. *Louisiana, supra; Buchalter* v. *New York*, 319 U. S. 427, 429). And, in the circumstances of this case, the decision must be made after, and will be based upon, an independent examination of the evidence (see Point IV above).

Respondent does not deny the force of these controlling rules and principles, but rather seeks to circumvent their proper application. This, as shown above, he may not do. Neither may he contend that because the settlement hearings were essentially appellate in nature they may not or need not be tested by due process standards. Nor may he maintain that due process must accommodate itself to expediency.

To cut brush:

California's automatic appeal law is an "extraordinary precaution" taken by the Legislature "to safeguard the rights of those upon whom the death penalty is imposed by the trial court" (*People* v. *Bob*, 29 Cal. 2nd 321, 328). (See "A". The Law of California—Substantive and Procedural

—dealing with Review of Death Penalty Convictions by its Supreme Court, Pet. Br., pp. 39-41.) As stated in Petitioner's Brief, at page 53: "California's mandatory appeal procedures were designed to protect Petitioner's rights, not destroy them—and him—through an act over which he had no control, the death of the Court reporter." In other words, this mandatory appeal, like due process itself, is a shield, not a sword.

Respondent does not deny, but seeks to justify, the fact that here "with the death of the court reporter, the record was not and could not be prepared in accordance with any existing law or rule governing appeals and particularly this mandatory appeal. All state-established due process had to be thrown out and an *ad hoc* procedure had to be invented if a record was to be prepared at all" (Pet. Br., p. 40).

Neither does Respondent deny that such a record was prepared by "human ingenuity" in the manner shown in Petitioner's Brief and over Petitioner's objections. Here, it bears repeating, the prosecutor had sworn to the California Supreme Court that Petitioner would have the disputed transcript delivered to him "in court" and that Petitioner would be allowed to present his objections to it at that time (Pet. Ex. 1, Jacket 11, Respondent's Points and Authorities in Opposition to Petition for Writ of Prohibition, with Exhibits Attached, affidavit of J. Miller Leavy dated November 3, 1948). Here, too, the trial court had informed Petitioner "that there can and will be a *hearing* for the settlement of the transcript" (Rep. Tr. April 11, 1949, Pet. Ex. 1, Jacket 3). And here (Pet. Ex. 1, Jacket 11, Respondent's Points and Authorities in Opposition to Petition for Writ of Prohibition, with Exhibits attached), Petitioner had taken the following steps:

On June 30, 1948, while still in Los Angeles, on the same day as filing his notice of appeal, Petitioner sought a "true, complete and certified record" as being necessary to present his appeal;

On September 13, 1948, in his "Affidavit in Support of Request for Prompt Delivery of Trial Record and Need Therefor," he stated that he did not believe it legally proper for any process to complete the transcript be taken "unless affiant is personally present and only after he has read the 'raw' transcript", and asking that he be promptly furnished with the "raw" transcript and not a transcript which had been "modified, changed, or tampered with;"

On April 20, 1949, Petitioner asked the Superior Court to produce him at the settlement hearings (Pet. Ex. 17, Affidavit Responsive to Reporter's Transcript of Proceeding Re Filing of Reporter's Transcript on Appeal), and made a similar request to the State Supreme Court;

Subsequently, he filed with the trial court his list of inaccuracies and omissions (Pet. Ex. 1, Jacket 3, Defendant-Appellant's List of Inaccuracies and Omissions in the Record), and still later a revised list (Pet. Ex. 1, Jacket 3, Defendant-Appellant's Revised List of Inaccuracies and Omissions in the record, in which documents he sought to bring to the attention of the court, among other things, that the arguments of the prosecutor were not complete, that objectionable and prejudicial matter was weeded out, and that portions were seriously modified and changed, and he also specifically made reference to the instruction, missing in the transcript, in effect directing the jury to bring in the death penalty.

Here, too, Petitioner had motioned to be produced that he might test the questioned ability of the substitute re-

porter to decipher the notes and to offer a showing that the transcript was prejudicially incomplete and inadequate. But, as the record shows, Petitioner *was not* produced. Neither did the Court offer to appoint counsel, or even inquire of Petitioner whether he desired counsel. The substitute reporter was called and testified, crucial issues of fact were determined adversely to Petitioner, and the transcript was settled and approved at *ex parte,* but in reality adversary, hearings, conducted in the absence of Petitioner or anyone acting in his behalf. Petitioner was not then *or ever* permitted to defend against the use of the transcript. Neither had he been given any voice in the selection of the substitute reporter or the means employed to prepare the transcript.

Whether Petitioner has been denied due process is to be determined from the totality of the facts in this case. (*Betts* v. *Brady,* 316 U. S. 455, 462.) At pages 45-56 of his brief, Petitioner made a careful showing why, in the circumstances of this case, he was constitutionally entitled to be personally present and represented by counsel at, and to participate effectively in, the trial court settlement hearings. Having been sentenced to death, Petitioner had a substantial right to an appeal to the California Supreme Court upon a certified trial transcript of the entire record. The settlement hearings would determine Petitioner's right to such an appeal. No one, the California courts have recognized, "consistent with constitutional safeguards, can be deprived of the possession or title to property, *or any other substantial right,* without reasonable notice and an opportunity to be heard." (*Modern Loan Co.* v. *Police Court,* 12 Cal. App. 582, 587.) Here Petitioner was given no opportunity, in the judicial sense, to be heard, although

such an opportunity is an essential element of federal due process. "It is essential to the validity of the statute"—and, it necessarily follows, proceedings held under it—"that it furnish the means whereby one may enforce his constitutional rights." (*H. Moffat & Co.* v. *Hecke*, 68 Cal. App. 35, 39.) Here Petitioner could have enforced his constitutional rights by being produced at the settlement hearing. Respondent has at no point questioned that the trial court had the power and legal authority to produce him.

Under the cases cited at pages 47-48 of Petitioner's Brief, the settlement hearing order creating, settling and approving the transcript is wanting in due process and must be set aside.

In his "A Discussion of the Relief Requested by Petitioner", Respondent asks: "What possible purpose could a second hearing serve in the face of the demonstrated inability of Chessman to present anything beyond the wildest and most unsupported allegations?" (Resp. Br., p. 44).

Petitioner's allegations are neither wild nor unsupported. The short answer to the question is that a trial court hearing will serve to satisfy due process, while a denial of relief will serve only to satisfy California's determination to see Petitioner put to death at all costs. Judge Goodman possessed no power to settle or correct the record; the trial judge does have. Judge Goodman refused to permit the substitute reporter's ability to be tested or his competence to be challenged; a trial court hearing would permit these questions to be resolved; it would put to rest whether the deceased reporter's notes can be transcribed and whether Stanley Fraser is capable of transcribing them.

Judge Goodman stated that Stanley Fraser "could have been the most incompetent reporter in the world and could have made a mess of the transcript in typing it, and that does not raise any federal question. The State of California and the parties to that litigation could determine that" (H.R. 249, vol. V). But no such determination will ever be made unless this Court grants the relief Petitioner seeks.

Judge Goodman added: "* * * but what the State of California affords by way of methods of providing a transcript is not the subject or concern of this court" (H.R. 250, vol. V). But it is now the subject and concern of this Court.

Thus, it is apparent that Petitioner's prayer in the alternative for a trial court hearing does *not* "play a game with the Court." Rather it is Respondent who plays a forensic shell game with the facts.

While "Constitutional law like other mortal contrivances has to take some chances," (*Blinn* v. *Nelson*, 222 U. S. 1, 7), the risks it takes are calculated ones. It does not recklessly gamble with human life or liberty. When, in the circumstances disclosed, power to create and settle the record has been exercised so freely, the inexorable safeguard of a fair and open hearing with Petitioner allowed to participate effectively or to be represented by counsel, should be maintained in its integrity. The right to such a hearing is an obvious rudiment of fair play which should and must be afforded to Petitioner under the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency when that minimal requirement, as here, has been neglected or ignored. (See *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 U. S. 292, 304-305.)

These settlement hearings were in the appellate procedure, yet not truly of it, since issues of fact and not sterile questions of law were there determined. But no matter how they are regarded, it remains uncontrovertibly true that they are a part of the guilt-determining process established by the State of California—A vital part of the state process. To maintain the traditional integrity of the process of determining guilt or innocence, the integrity of all of the component steps must likewise be maintained.

The court's power and jurisdiction to grant the relief sought

This Court's Rule 40-1(h) required Petitioner to include in his brief, "A conclusion, specifying with particularity, the relief to which the party believes itself entitled." This was done (Pet. Br. pp. 57-58).

Respondent now advances an extraordinary claim: "The relief requested that Petitioner be discharged is, we submit, beyond the jurisdiction of this Court" (Resp. Br. p. 44).

Dowd v. *U. S. ex rel. Cook,* 340 U. S. 206, refutes such unsupported and unsupportable claim. Congress had granted to the United States District Court the power, in *habeas corpus* proceedings, to "dispose of the matter as law and justice require (28 U. S. C. sec. 2243). The traditional and historic function of *habeas corpus* is to inquire into the legality of the detention; and if it is found that the Petitioner is presently held in custody in violation of the Constitution of the United States, he is entitled to be discharged (see 28 USC sec. 2241(3); *McNally* v. *Hill,* 293 U. S. 131; *Dowd* v. *U. S. ex rel. Cook, supra; Frank* v. *Man-*

gum, 237 U. S. 309, 331; *Ex parte Royall*, 117 U. S. 241, 249; *Patterson* v. *Alabama*, 294 U. S. 600). This matter was exhaustively considered and put to rest by the Third Circuit in the recent case of *U S. ex rel. Elliott* v. *Hendricks*, 213 F. 2nd 922, 924-929.

The ultimate judicial power of the United States resides in this Court (United States Constitution, Art. III, sec. 1). It has appellate jurisdiction of this case, *both as to law and fact* (United States Constitution, Art. III, sec. 2(1) and (2); 28 USC sec. 1254(1); see Jurisdictional Statement, Pet. Brief, pp. 5-6). And in the lawful exercise of its supreme judicial power and appellate jurisdiction, the Court further has the right and duty to determine conclusively whether Petitioner has been deprived of rights guaranteed him by the Fourteenth Amendment. Otherwise the supremacy clause of the United States Constitution (Art. IV, sec. 2) would be meaningless.

Thus Respondent may not seriously maintain the Court lacks either the power or the jurisdiction to reverse (or vacate), with appropriate directions, the judgment of the Court of Appeals which affirmed the order of the District Court discharging the writ of *habeas corpus* previously granted, and to find the trial court's order creating, settling and approving the trial transcript, as well as the California Supreme Court's affirmance of the judgments of conviction—based as they were upon that transcript—are void and hence that they must be set aside. Neither may Respondent seriously maintain the Court lacks either the power or jurisdiction to "hold that, in the circumstances of this case," as set out in the paragraph numbered three (Pet. Brief, p. 57), "Petitioner had a constitutional right under the Fourteenth Amendment to be personally pres-

ent and represented by counsel at, and to participate effectively in, the proceedings in the State trial court to create and settle the uniquely prepared reporter's transcript to be used on the automatic appeal," and then to rule, in the alternative, in the manner sought in the paragraph numbered four (Pet. Br., p. 57), and thus give its findings, holdings and judgment force and effect.

This, Petitioner submits, is what law and justice require.

CONCLUSION

The specific relief sought at pages 57-58 of Petitioner's brief should be granted. As shown above, nothing Respondent has advanced compels a contrary conclusion.

Dated: May 17, 1957.

Respectfully submitted,

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CARYL CHESSMAN
Petitioner pro se

ROSALIE S. ASHER
Of Counsel

Table of Authorities Cited

Cases

Codes

Texts

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 566 Misc.

CARYL CHESSMAN,
Petitioner,

vs.

HARLEY O. TEETS, Warden of the California State Prison, San Quentin,
Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

The United States Court of Appeals for the Ninth Circuit affirmed the judgment discharging the writ of habeas corpus and remanding the petitioner to the custody of the Warden in an opinion reported as *Chessman v. Teets,* 239 Fed.2d 205. The opinion of the United States District Court is reported as *Chessman v. Teets,* 138 Fed.Supp. 761 (1956).

JURISDICTION.

The jurisdiction of this Court is apparently invoked under 28 U.S.C. § 1253. The order of the United States Court of Appeals denying a rehearing was entered on November 30, 1956.

QUESTIONS PRESENTED.

Did the District Court err in ruling on motions, the admissibility of evidence, or procedural questions at the hearing?

Did the District Court properly exercise its discretion in considering only the question of fraud and corruption in the preparation of the transcript used on appeal in the State courts?

STATEMENT OF THE CASE.

History of This Litigation.

On December 30, 1954, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Northern Division. (CT 1.) Judge Goodman denied the writ on January 4, 1955. (CT 24.) Thereafter the matter was appealed to the United States Court of Appeals which rendered an opinion reported in *Chessman v. Teets,* 221 U.S. 276. Thereafter a writ of certiorari was sought and the United States Supreme Court ordered a hearing on the question of fraud and collusion in the settlement of the record. See 350 U.S. 3. (CT 53.)

On November 30, 1955, petitioner's counsel secured the issuance of a writ of habeas corpus returnable December 8, 1955. (CT 55.) A return to the writ was filed on December 8, 1955. (CT 56.) The matter was set for hearing on January 9, 1956. (CT 58.) At the same time the custody of petitioner was transferred to the marshal. Petitioner remained in the state prison and an order was made providing for consultation between petitioner and his counsel. (CT 59.) This order was thereafter amended on December 21, 1955. (CT 100.) Thereafter the trial of the matter was continued on January 10, 1956 and thereafter to January 16, 1956 (CT 122). The matter proceeded to trial on January 16, 1956, and the trial continued through January 24, 1956. On January 31, 1956, Judge Goodman filed an opinion, findings of fact and judgment ordering the writ discharged and petitioner remanded to the custody of respondent (CT 204-215.) The matter was thereafter appealed to the United States Court of Appeals for the Ninth Circuit and its opinion is reported as *Chessman v. Teets*, 239 Fed. 2d 205.

Pages one through six of the clerk's transcript contain excerpts from the docket entries in the *Chessman* case from the period of December 30, 1954 to March 12, 1956.

Statement of the Facts.

Since petitioner did not attack the sufficiency of any of the findings of fact in the United States Court of Appeals, no detailed summary of the evidence produced at the trial will be made.

In 1948 petitioner was convicted of seventeen felonies. Two of the judgments imposed the death penalty. These convictions were affirmed on appeal by the California Supreme Court (*People v. Chessman*, 38 Cal.2d 166, cert. den. 343 U.S. 934, rehearing den. 343 U.S. 937). The court reporter, Mr. Perry, died without having completed his transcript. A substitute court reporter, Mr. Fraser, was employed to complete the transcript.

The substance of the allegations of the petition, which was made the traverse, was that the substitute court reporter, Mr. Fraser, the prosecutor, Mr. J. Miller Leavy, and the trial judge, Judge Fricke, conspired and colluded in the preparation of a fraudulent transcript for the California Supreme Court. Petitioner also alleged that Fraser was incompetent, and an instrument of the prosecutor, and that the notes were undecipherable. Petitioner specifically alleged that on May 21, 1948, the transcription omitted an instruction of the judge which required the jury to bring in a death penalty and that the transcript also omitted a remark of the judge to the effect that the petitioner was the "worst criminal" that had ever been in his court.

The substitute court reporter, Mr. Fraser, the prosecutor, Mr. Leavy, and Judge Fricke, were all produced and examined by petitioner's counsel at the hearing. Likewise, Mr. Luskin, assistant county clerk in charge of the criminal records, who was at the time of the trial Judge Fricke's clerk, testified. Also, Mr. DeNoia, deputy clerk of the California Supreme

Court and Mr. Jones, clerk of the Superior Court of Marin County, testified pertaining to records in their respective courts. Petitioner himself likewise took the stand.

The People produced a Pittman shorthand expert and two of the jurors as their witnesses.

As a result of the testimony of these witnesses the court expressly found that the prosecutor did not engage in any fraud or unlawful conduct in preparing the transcript on appeal in petitioner's case; that the prosecutor did not knowingly or otherwise make any misrepresentations to the trial judge for the purpose of inducing the trial judge to certify, allow or approve the transcript; that the prosecutor made no misrepresentations of any kind to the trial judge as to the accuracy or correctness of the transcript, and further, that it was not true that the transcript prepared by Fraser had been materially or otherwise altered through the connivance of Fraser or Leavy, nor was there any corrupt arrangement between them to prepare a fraudulent transcript.

The court found that the shorthand reporter, Perry, was fully competent and physically able at all times to record the proceedings of the trial in the state court.

Likewise, the court found that it was not true that the substitute reporter, Fraser, was a discredited reporter for the State of Washington; that it was not true that Fraser had been discharged at any time for incompetency, drunkenness or for any other cause; that it was not true that Fraser was inebriated or

under the influence of alcohol or mentally incapable of such work at any of the times he engaged in transcribing the notes.

The trial court further found that Fraser was especially and exceptionally competent to transcribe Perry's notes and did so with fairness and competence.

The instructions given by the trial judge to the jury on May 21 were accurately and correctly reported in the transcript as prepared by Fraser. The district court expressly found that the trial judge did not state to the jury that "the defendant is one of the worst criminals I have ever had in my court". (CT 211-213.)

PREFACE TO THE ARGUMENT.

The petition for writ of certiorari filed in the instant case is one of the most scurrilous and misleading petitions or briefs ever to come to the attention of respondent. If the document were merely a brief, a motion to strike would be in order. The filing of such a petition is unjust to the many diligent defense counsel who vigorously, but fairly, present cases to appellate courts. Many counsel, on both sides of a case, occasionally overstate a proposition or simply make a mistake concerning some matter of record or some matter of law. The present petition for certiorari, however, is filled with misleading statements, misstatements of the record and intemperate abuse of

Federal judges and persons connected with the petitioner's prosecution.

This brief shall only seek to correct a few of the most glaring of these misstatements. Respondent shall not seek to point out each of the numerous misstatements. To do so would be to lose sight of the function of an opposition to a petition for writ of certiorari, which function is to assist the court in determining whether any important or major problems exist which this Court should determine.

ARGUMENT.

I.

THE DISTRICT COURT GRANTED PETITIONER A FULL AND FAIR HEARING AND ALL RULINGS OF THE DISTRICT COURT WERE REVIEWED BY THE COURT OF APPEALS AND CORRECTLY DETERMINED BY THAT COURT; NO IMPORTANT QUESTION CONCERNING THE CONDUCT OF THE TRIAL BELOW IS PRESENTED FOR THIS COURT'S DETERMINATION.

The United States District Court granted petitioner a full and fair hearing, which hearing lasted for a period of seven trial days. The District Court made findings of fact and entered a judgment discharging the writ. The United States Court of Appeals fully reviewed all of the District Court's rulings on motions, admissibility of evidence, and procedural matters.

Likewise, many of the questions raised by the petition for certiorari where not raised in the United States Court of Appeals; for example: An examination of the briefs filed by appellant in the United

States Court of Appeals will reveal that petitioner made no attack on the sufficiency of any of the findings of fact made by the District Judge, and yet petitioner devotes several pages to this particular subject in his petition for writ of certiorari.

The decision of the United States Supreme Court in *Chessman v. California,* 350 U.S. 3, ordered a hearing on the question of fraud and corruption in the preparation of the transcript for the California Supreme Court. The trial court has held hearings and made findings on these issues. Petitioner did not object, in the United States Court of Appeals, to the propriety of the findings that there was no fraud or collusion by the prosecutor, substitute reporter or the court, or to the finding that the court reporter transcribed the deceased reporter's notes with fairness and competence. It is hoped that the allegation of fraud, corruption and inaccuracy are laid at rest once and for all, even though petitioner insists upon making these allegations in his present petition.

Petitioner has enumerated many objections to the proceedings in the District Court. Some are completely unjustified and based on a distortion of the proceedings below.

The numerous objections to the proceedings in the District Court have been already discussed in the opinion of the United States Court of Appeals and little can be added except to correct some of the misleading statements made by petitioner.

Petitioner complains that the District Judge precluded him from challenging the accuracy of the tran-

script at the trial. Petitioner at page 38 of his petition boldly asserts that he made a detailed offer of proof on this subject. Such statement of the record is not supported by any references to the transcript, and cannot be supported by any references in the transcript. Petitioner has not made one reference to the exclusion of evidence which he offered on the subject of the accuracy and decipherability of the notes. He does not point to any rulings because there was no evidence offered on this subject by petitioner. Also, he does not object to the ruling on any particular questions put to the witnesses Fraser and Burdick, who testified as to the accuracy and decipherability of the notes.

Indeed, in the preliminary stages in December, prior to the trial, petitioner's counsel asserted that their expert had found "hundreds" of errors in the transcript (pretrial RT 201-202). However, this witness was not offered on the subject and no ruling as to the admissibility of his testimony was necessary. Perhaps the witness was not offered because if he were able to find "hundreds" of errors, it would indicate that he was able to decipher, and in fact could accurately read, the notes in order to determine the correct transcription from the alleged erroneous one.

Petitioner also attempts to make much of his demand that Fraser, the substitute court reporter, be required to submit to a test in court as to his ability to decipher the notes. The *record establishes* that the District Court offered to put the substitute court reporter in his chambers in order to permit him to work on the transcription of a page of the original notes

(see RT 281-292:21). Petitioner did not avail himself of this offer. Furthermore, the witness read the substance of pp. 70-73 of the notes in court. (RT 368.)

Petitioner raises a false issue in his contention that the District Court precluded him from offering arrest reports and hospital records concerning the substitute court reporter. Such issue is false because no such evidence was offered and no such ruling was necessary. The petitioner sought an order for the production of such records, but did not offer them (RT 912).

Likewise, the contention concerning the refusal of the trial court to permit questions concerning the arrest reports and hospital records is without substance. The hospital records referred to were clearly irrelevant since they were records of the hospitalization of the substitute court reporter in 1953, three years subsequent to the date of the transcription. Likewise the arrest reports are irrelevant since convictions, and not arrest reports, are admissible. Also, these records would not establish that the substitute court reporter was intoxicated while actually working on the transcript. Such inquiry would not necessarily have a bearing on the issue of fraud or collusion or corruption.

Petitioner likewise contends that he was denied an opportunity to adequately prepare for trial. In December, 1954, petitioner filed a *verified* petition swearing that the substitute court reporter, deputy district attorney and the trial judge entered into a fraudulent and corrupt arrangement to procure a fraudulent transcript for the use of the California Supreme

Court. Presumably petitioner was ready and able to prove those very serious charges at that time. The petition contains a statement that "said persons have stated that they are willing to testify to facts germane to this matter under oath pursuant to subpoena" (CT 22).

On November 30, 1955, after a hearing on the question of fraud was ordered by the U.S. Supreme Court, petitioner's counsel demanded the issuance of a writ of habeas corpus. (Pretrial RT 32.) At this same time petitioner's counsel insisted that petitioner was ready and able to proceed to trial immediately. (Pretrial RT 20:8; 32:24.) At petitioner's request the writ was issued returnable December 8, 1955. The trial was set for January 9, and later continued to January 16, 1956. Thus the trial was held well over a month after the return to the writ was filed, when, in fact, the statute contemplates an immediate trial. Sec. 2243, title 28 of the U.S. Code provides that "When the writ or order is returned, a day shall be set for hearing, not more than five days after the return, unless for good cause additional time is allowed." The statute contemplates an immediate trial on the sworn statements of the petition, which would become the traverse to the return. In the light of petitioner's initial insistence that he was ready for trial, the setting of the hearing at a period of a month and a half from the date was more than a liberal allowance by the trial court.

Petitioner also contends that his time to prepare was inadequate due to the facilities at the prison and

the interference with his preparation by the prison authorities. He alleges that the affidavits filed by himself and other persons in the pretrial proceedings concerning the conditions at the prison were unanswered by counter-affidavits. Most of these proceedings were had without notice and due to the shortness of time counter-affidavits were unable to be prepared. (See pretrial RT 120:10.)

It should be noted, however, that on December 21, 1955, Mr. Davis and Miss Asher had elected to use but 12 hours and 25 minutes out of a possible 104 hours available to them under the order of the court. (Pretrial RT 119:13.)

Furthermore, insofar as the prison guards looked at the papers passed between Chessman and his counsel, the Warden testified that the guards did not know the difference between legal papers of one kind or another. They simply looked in order to determine whether the paper was part of a manuscript of a book or a legal document. (See pretrial RT 154:13-17.)

Furthermore, on December 30, 1955, the District Court made the unprecedented offer to counsel that the petitioner might be transferred to the Federal authorities at Alcatraz, and set out in detail the availability of facilities to petitioner for consultation with his counsel and other persons. (See pretrial RT 186:20-189.) This offer was not accepted.

Likewise, the petition for certiorari contains an allegation that the District Judge was biased and prejudiced against him and likewise allegations that Judge Lemmon of the United States Court of Appeals

had a fixed personal opinion. The petition makes many sweeping accusations and quotes the court out of context.

The United States Court of Appeals has fully discussed the question involving the sufficiency of the affidavit of prejudice. Thus respondent will here point out some of petitioner's misstatements in this regard. For example, petitioner states that "a fair sample of Judge Goodman's unusual reaction and attitude . . . is revealed by his comments: . . . 'this should be in the State of California, but until there is some change in the statutes we have to use this laundry to take care of this affair instead of the State of California.' "

To construe this statement as a criticism of petitioner is to stretch the imagination. In fact, such statement is more reasonably interpreted as a criticism of the State of California for refusing to "take care of this matter".

Likewise, petitioner, at page 20 of his petition, quotes the District Court as follows, " 'I don't like to make an order' enforcing petitioner's rights, because it was a state case. . . ." Said statement is grossly misleading and has taken the District Court's statements out of context, and the editing itself is indicative of its misleading character.

In fact, the record clearly establishes that Judge Goodman was very fair and very patient throughout this whole proceeding. He granted petitioner an additional month and a half to prepare prior to the trial, rather than the five days set out in the U.S. Code. Judge Goodman likewise made an unprecedented

offer to petitioner. Although the marshal had no facilities himself in which to take actual custody of petitioner, the court arranged with the federal prison authorities at Alcatraz for petitioner to stay in those facilities pending the completion of the hearing. Likewise, the District Judge ordered the respondent to produce the notes from Los Angeles and deposit them with the Clerk for the Northern District of California. He likewise secured the attendance of five witnesses for the petitioner, including the Superior Court Judge and the substitute court reporter. Judge Goodman was patient and fair throughout the seven-day hearing.

It is submitted that any allegations of bias and prejudice against the District Judge stems only from a personal antipathy toward anyone who does not agree with petitioner.

It is further submitted that these many quibbles which petitioner has with the conduct of the hearing in the District Court have all been completely and fully reviewed by the United States Court of Appeals and that court's determination that petitioner had a full and fair hearing is correct. No important question concerning the conduct of hearing in the District Court is presented for this Court's determination.

II.

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN CONSIDERING ONLY THE QUESTION OF FRAUD AND COLLUSION IN THE PREPARATION OF THE RECORD ON APPEAL; NO CONSTITUTIONAL PROBLEM IS PRESENTED FOR REVIEW BY THIS COURT AS TO THE PROCEDURES USED IN THE CALIFORNIA COURTS TO SETTLE THE RECORD.

The constitutionality of the procedure used in the California courts has been adjudicated as constitutional; the procedures used were proper and in no way violated equal protection of the law. Petitioner again contends that he was denied due process and equal protection of the law by the procedure used to settle the record in the State court. He alleges that in the absence of his physical presence the proceedings were fatally defective. There are at least four answers to these contentions.

A. The District Court could properly refuse to consider any allegations concerning the procedure used to settle the record in the California courts other than the question of fraud and collusion in the preparation of such record.

The District Court could properly rule on the ground that such allegation was repetitious, as well as being without merit. The District Court is not required to entertain a repetitious petition. The question of the validity of the procedure used to settle the record in the State court has been expressly raised many times, in both the State and Federal courts. The question was expressly raised in the case of *People v. Chessman,* 35 Cal.2d 455, and this Court denied certiorari in 340 U.S. 840.

The petition which was originally filed in December, 1954, contained essentially the same allegations as

prior petitions in the Federal courts, and was repetition, and thus properly denied.

The rule which permits a District Judge to deny was set out in *Salinger v. Loisel,* 265 U.S. 224. Congress has codified the principles of *Salinger v. Loisel* into section 2244, Title 28 of the U.S. Code. The District Judge properly exercised his discretion in denying that portion of the petition, since the matter had been determined on a prior application.

The rule which permits denial of repetitious petitions is sound. A court should not be required to repeat its rulings without end.

B. The constitutionality of the procedures used to settle the record has been adjudicated.

The U.S. Court of Appeals, in the case of *Chessman v. Teets,* 221 Fed.2d 276 at 278, expressly determined that Chessman had waived his right to counsel and was precluded from urging the matter. This Court, in 350 U.S. 3, impliedly adjudicated this issue by ordering a hearing solely on the question of fraud and collusion in the settlement of the record. Of course, the United States Supreme Court likewise impliedly approved the procedure used in prior decisions. The question was expressly raised in the case of *People v. Chessman,* 35 Cal.2d 455, this Court denied certiorari (340 U.S. 840).

In that particular case this Court had the opportunity to pass on all phases of the procedure used in the State court to settle the record. In that particular case the constitutional question was clearly presented and was not entangled with any State question.

Policy demands an end to litigation, and we will not assume that the United States Supreme Court intended that after a full hearing to determine the issue of fraud and corruption in the settlement of the record, the issue of the procedure used in the State courts should again be raised in this Court and thus further impede and stifle the State administration of justice.

C. The procedure used by the State court was constitutional; it did not deny petitioner due process or equal protection of the law.

A state is not required under the due process clause to provide an appellate procedure for review of a criminal trial. (See *Brown v. Allen,* 344 U.S. 443, at 486; *McKane v. Durston,* 153 U.S. 684, at 687.)

However, such appellate procedures must not be discriminatory. See *Cochran v. Kansas,* 316 U.S. 255 (prison officials prevented the filing of an appeal); *Dowd v. Cook,* 340 U.S. 206 (prison officials prevented the filing of an appeal); *Cole v. Arkansas,* 333 U.S. 196 (defendant's convictions were affirmed under a criminal statute for violation of which they had not been charged).

The procedure in California for the settlement of a record where a court reporter dies before transcribing his notes was set out in *People v. Chessman,* 35 Cal.2d 455. This *was and is the law of California.* This procedure was reasonable, and in no way discriminatory as to Chessman.

Procedures for the determination of the record in similar cases has been approved by several State

courts. See note 19 A.L.R.2d 1098. Also see *Dowdell v. United States,* 221 U.S. 325.

The procedure used in this particular case is not dissimilar to the common law procedure or the procedure followed by numerous states until very recently in the settlement of bills of exceptions.

The procedure used in the State court to determine the accuracy of the record included the appointment of one of the deceased reporter's former employees to transcribe the notes of the deceased reporter. This reporter was aided by the notes which had been taken by the judge during the trial. A copy was sent to Chessman. He submitted a written "Motion to Augment and Correct Record" in which he requested numerous changes. The trial judge heard the written objections to the record, he allowed some and disallowed others. The reporter certified the record as being full and complete to the best of his ability. The trial judge certified that "the objections made to the transcript herein have been heard and determined and the same is now corrected in accordance with such determination . . . and the same is now, therefore, approved by me . . ." (see *People v. Chessman,* 35 Cal.2d 455, at 459).

Likewise, Chessman submitted a long list of corrections to the California Supreme Court in the proceedings held before that court. Indeed, we have noted that the District Judge expressly found that there was no fraudulent or unlawful conduct in the preparation of the transcript on appeal by the Deputy District Attorney and no misrepresentation to the trial judge

for the purpose of inducing the trial judge to settle the record. The District Judge likewise found that there was no fraud or collusion between the Deputy District Attorney, the substitute reporter, and the judge in the settlement of the record. Furthermore, the District Court expressly found that Fraser, the substitute court reporter, was especially competent to transcribe Perry's notes and did so, with fairness and competence. Furthermore, the District Court expressly found that Fraser and Leavy and the trial judge "endeavored to and did complete the transcript in the Chessman case in the best of good faith and with diligence and fairness so that a fair and correct record could be presented to the Supreme Court of California . . ." (CT 211-213)..

Furthermore, as is pointed out by the Supreme Court of California in the decision of *People v. Chessman,* 35 Cal.2d 455, at 462, 465, even if all of the inaccuracies and omissions claimed by Chessman were allowed, the subject on appeal would nevertheless not have been affected.

D. Any alleged denial of due process by virtue of the fact that appellant was not present at the settlement of the record in the State court has been waived.

Petitioner asserts that he was denied due process since he was not given the opportunity to defend against the disputed transcript in the State court.

Petitioner's contention has never been that he was deprived of counsel at proceedings to settle the record, but his contention was that he was his own counsel and he must be allowed to be present. If his conten-

tion now is that he was deprived of the right to be represented by counsel at these hearings, he was waived to objection by failing to raise the objection on appeal in the State court. He may not use the writ of habeas corpus as a writ of error.

Furthermore, the California Supreme Court determined the question of petitioner's right to be present as follows:

> "Defendant urges that he should have been allowed to appear personally in the proceedings which resulted in the present reporter's transcript, and that he should now be allowed to appear personally before the trial judge in support of his position. Since the entry of the judgments of conviction defendant has been lawfully imprisoned awaiting determination of his appeal. He is presently lawfully confined in San Quentin. He was not and is not entitled as a matter of right to go about the state making appearances before Courts to present legal arguments. Neither reason, public policy, nor any express provision of law require defendant's personal presence at proceedings to determine the accuracy of a transcript. From a time before his trial began defendant has repeatedly claimed, as he does now, that in connection with his representation of himself he is entitled to rights and should be accorded privileges greater than those of a defendand who is represented by counsel." (*People v. Chessman*, 35 Cal.2d 455, 467.)

This is a reasonable rule of procedure and thus not violative of due process. In fact a like rule applies to federal prisoners who file appeals or other legal

proceedings in federal courts after conviction and confinement.

CONCLUSION.

We respectfully submit that the petition for writ of certiorari be denied.

Dated, San Francisco, California,
March 11, 1957.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 893
(Formerly No. 566 Misc.)

CARYL CHESSMAN,
Petitioner,

vs.

HARLEY O. TEETS, Warden of the California State Prison, San Quentin, California,
Respondent.

Respondent's Brief

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QUESTION PRESENTED

Whether in the circumstances of this case, the State Court proceedings to settle the trial transcript, upon which petitioner's automatic appeal from his conviction was necessarily heard by the Supreme Court of the State of California, in which trial Court proceedings petitioner allegedly was not represented in person or by counsel designated by the State Court in his behalf, resulted in denying petitioner due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE MANNER IN WHICH THE RECORD WAS PREPARED, SUBMITTED TO CHESSMAN FOR CORRECTION, AND ADOPTED BY THE TRIAL JUDGE

On May 21, 1948, a trial jury in Los Angeles, California returned verdicts in criminal proceedings entitled "*The People of the State of California v. Caryl Chessman,*" No. 117963, No. 117964. Chessman was convicted of 17 felonies. It was a trial in which Chessman had rejected the aid of counsel. Before trial commenced, Chessman relieved private attorney V. L. Ferguson as counsel. The public defender was also relieved and again before trial an offer of aid from Deputy Public Defender Al Matthews was refused. As it is reported by the California Supreme Court, this is what occurred:*

> "* * * Forty-eight days before the trial began, defendant appeared for plea. He had previously been represented by counsel but at this time he said, 'I wish to represent myself.' The following colloquy took place:
>
> 'The Court: Are you a good lawyer?
>
> The Defendant Chessman: I think so.
>
> The Court: Few lawyers say they are good.
>
> The Defendant Chessman: I think I am a good enough lawyer.
>
> The Court: You don't want to trust it to a lawyer?
>
> The Defendant Chessman: I don't want to do it.
>
> The Court: What will probably happen, if we set this case down for trial, you will want a lawyer and then ask for a continuance. If you want to try your own case, there is no way we can tell you not to. You will have to try it or have somebody hired to represent you in plenty of time to try the case at the time it is set.
>
> The Defendant Chessman: I understand that.

People v. Chessman (1950), 35 Cal. 2d 455, at 466.
People v. Chessman (1951), 38 C.2d 166 at 173.

> The Court: Because many times men with past experiences such as you have had—you know the tricks of the trade, and they get a lawyer at the very last minute. You really want to try your own case?
> The Defendant Chessman: That is correct.'"

The Supreme Court further stated at page 467:

> "* * * The record further shows that defendant repeatedly refused to permit the public defender to represent him."

Another instance of Chessman's insistence on his right to represent himself occurs in the reporter's transcript, page 4, volume 1:

> "I wish to point out that it is my intention to act in propria persona at this time *and to continue to do so until such time as* it is legally established that I am not qualified to do so, and that I will not accept a court-appointed attorney."

The record contains no less than 35 instances thereafter wherein Chessman stated either to the court or to the jury or to both that he had elected to represent himself. Despite Chessman's positive rejection of counsel throughout the trial, he had the services of Deputy Public Defender Al Matthews as "legal adviser" as well as the services of an investigator of the Public Defender's Office, who in fact interviewed some of the thirty-four witnesses on his behalf (*People v. Chessman*, 35 Cal. 2d 455, at 466; Reporter's Transcript of the trial proceedings).

On June 23, 1948, Ernest R. Perry, the official reporter of the oral proceedings at the Chessman trial died (Rep. Tr. (6-25-49) pp. 14-18).

On June 25, 1948, following the denial of a motion for a new trial, Chessman made a motion under § 953e of the California Code of Civil Procedure to set aside and vacate

the judgment on the ground that Reporter Perry had died and that it was impossible to have a phonographic reporter transcribe the evidence recorded in the case. The motion was denied (Rep. Tr. (6-25-48), pp. 14-18). Chessman asked the California Supreme Court to prohibit preparation of the transcript. He was denied (*Chessman v. Superior Court*, Crim. 4950 Sup. Ct.).

Chessman did not at any time serve and file application for permission to prepare a settled statement in lieu of a reporter's transcript as was his apparent right under Rule 36 of the Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California.

On June 25, 1948, J. Miller Leavy, deputy district attorney, informed the court that prior to his death Reporter Perry had dictated six days of the oral proceedings recorded by him in the case; that, since Reporter Perry's death, the District Attorney's Office had taken steps to see that necessary expenses were obtained for the employment of a court reporter to transcribe the notes of the deceased reporter, so that the California Supreme Court would receive a complete record of all the testimony and all other matters necessary for determination of an appeal (Rep. Tr. (6-25-48), pp. 15-16).

Honorable Charles W. Fricke, trial judge, then stated that there existed the necessity in the proper administration of justice for the entire record of the trial to be prepared in as complete and full a manner as possible, so that justice might be done the appellant; he then ordered the clerk of the criminal court to request the county board of supervisors to provide such service and adequate compensation therefor to facilitate the preparation of a record on appeal (Rep. Tr. (6-25-48), p. 16).

Another court reporter, Stanley Fraser, was employed by the county to transcribe the notes.

By affidavits of Deputy District Attorney Leavy and Reporter Fraser, the California Supreme Court granted extensions from time to time to permit Reporter Fraser to complete transcription of Reporter Perry's notes remaining undictated and untranscribed at the time of his death on June 23, 1948, in order that a record on appeal might be presented to the California Supreme Court (Affidavits and correspondence contained in file in Supreme Court in Extension No. 2692 (3)).

On September 13, 1948, Grace Petermichael, transcriber for Reporter Perry for many years during his lifetime, filed in the clerk's office of Los Angeles County 646 pages of the reporter's transcript as dictated by Reporter Perry prior to his death and as transcribed by Grace Petermichael. This was done by Grace Petermichael at the direction and request of Deputy District Attorney Leavy (Affidavit of Grace Petermichael, contained in the superior court file, of which there is a certified copy submitted along with affidavits on this hearing; "Second Affidavit," J. Miller Leavy, Exs. "D" and "E").

On February 24, 1949, Deputy District Attorney Leavy filed in open court in Department 43 in the Chessman matter the portion of the reporter's transcript up to that date dictated and transcribed by Reporter Fraser from the deceased reporter's notes, consisting of pages 647 to 1,558, inclusive, along with that portion of the reporter's transcript prepared by Grace Petermichael from the dictation of Reporter Perry during his lifetime, consisting of pages 1 to 646, inclusive; the record up to that date was offered to the court for settlement under Rules 36(a) and (b) of the Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California, as formulated by the Judicial Council (Rep. Tr. (2-24-49), pp. 2-5).

On April 11, 1949, the remainder of the reporter's transcript, as dictated and transcribed by Reporter Fraser, consisting of the argument of the prosecution and the defense, —pages 1,559 to 1,810, inclusive,—was filed by Deputy District Attorney Leavy in open court in Department 43 and offered for settlement under Rules 36(a) and (b), Rules on Appeal, as formulated by the Judicial Council (Rep. Tr. (4-11-49), pp. 6-7).

The court received and ordered filed the remainder of the reporter's transcript as prepared by Reporter Fraser to be used as a basis of settling the record under Rules 35 and 36(a) and (b), Rules on Appeal. The court directed the clerk to serve the transcript upon Chessman and ordered the clerk to notify Chessman that he was required to present any objections, corrections or additions to the transcript he might have. Chessman was also informed that if additional time was required for presentation of corrections, such would be allowed if necessary (Rep. Tr. (4-11-49), pp. 9-10).

The California Supreme Court granted to Chessman to and including May 18, 1949, within which to submit to the superior court proposed corrections to the reporter's transcript as filed with the county clerk of Los Angeles on April 11, 1949.

The California Supreme Court, at the same time, denied, *without prejudice*, Chessman's application for an order directing his removal from San Quentin State Prison to Los Angeles County Jail for the purpose of presenting his proposed objections to the superior court (Extension No. 2704, files of the Supreme Court of the State of California).

We do not find that Chessman ever directly requested the trial court to order his physical presence on the settlement of the record on appeal, nor do we find action by appropriate writ seeking remedy (Supp. Cl. Tr. (as certified, 7-11-49) Ex. 1).

On May 12, 1949, Chessman filed his corrections in superior court. The document is variously entitled "Motion to Correct and Augment Record (Reporter's Transcript)" and "Defendant-Appellant's List of Inaccuracies and Omissions in the Record (Reporter's Transcript)" (Supp. Cl. Tr. (as certified July 11, 1949), including Exhibit 1).

On June 1, 2, and 3, 1949, in Department 43 of the superior court, Judge Fricke heard and considered all of Chessman's proposed list of inaccuracies and omissions in the record (Supp. Cl. Tr., as certified June 28, 1949 (with Exhibits 1, 2 and 3); Rep. Tr. (6-1-49), pp. 14-83).

On June 1, 2, and 3, 1949, the court, in hearing and determining Chessman's list of inaccuracies and omissions in the record, had the benefit not only of Chessman's list, but also of a memorandum prepared by Reporter Fraser, as well as notes of the trial judge. This memorandum prepared by Reporter Fraser was a comparison of Chessman's list of proposed corrections and omissions with the original notes of Reporter Perry recorded by him at the trial. The court likewise had the use of a memorandum prepared by Grace Petermichael, who transcribed pages 1 to 646, inclusive, of the reporter's transcript (Supp. Cl. Trs., as certified on June 28 and July 11, 1949 (including Exhibits 1, 2 and 3); Rep. Tr. (6-1-49), pp. 19-26).

The court then approved the transcript under Rules 35 and 36, Rules on Appeal of the Judicial Council, and stated:

> "The Court has now gone over the entire transcript, the entire objections and suggestions by the appellant for correction of the transcript and now certifies that all objections made thereto have been determined * * * the transcript has been corrected in accordance with the Court's determination * * * The Court further certifies that the transcription of the testimony and proceedings just reviewed by the Court have been

satisfactorily completed and the transcript is hereby approved * * *

"* * * The Court has therefore endeavored to the best of its ability to comply with the proceedings as they would be conducted under Rule 35 and also under Rule 36, having in mind the primary desire to present to the Supreme Court of this State as complete and accurate a record as possible and in these proceedings the Court has not considered the requirements upon the appellant of preparing a statement but has treated the transcription of the shorthand notes by Mr. Fraser as the basis of establishing a transcript on appeal in this case." (Rep. Tr. (6-1-49), pp. 82-83)

The record was then forwarded to the California Supreme Court and to Chessman.

This is the proceeding which has been minutely examined by the many courts passing upon the various Chessman appeals or petitions.

SUMMARY OF ARGUMENT

The petitioner, Caryl Chessman, elected to defend himself and refused assistance of counsel on more than one occasion. His failure to assist in preparation of the transcript compelled the State to resort to the procedure used. The lack of personal appearance by Chessman at the proceeding settling the transcript were dictated by public safety requirements and by his peculiar status as a convicted felon. The failure of Chessman to be represented by counsel at such proceedings was compelled by his prior persistent refusal to accept counsel. There was no lack of due process in a proceeding which is entirely appellate in nature and at which issues of fact were not being tried. There was no discrimination in the proceedings as to Chessman, and there was no showing that any different result would have

obtained even allowing all of Chessman's corrections and even assuming his personal appearance. The proceedings held in connection with the settling of the trial transcript have been reviewed almost annually and have been determined to be complete so far as due process requirements are concerned. The mode of transcript preparation has been specifically adjudicated as to competency and fairness, and for all of these reasons here set forth, Chessman does not spell out in any manner a violation of the due process requirements as to his cause.

THE SETTLEMENT METHOD ADOPTED IN VIEW OF THE REFUSAL OR FAILURE OF CHESSMAN TO SUBMIT A SETTLED STATEMENT UNDER THE RULES ON APPEAL WAS REASONABLE AND PROPER UNDER THE CIRCUMSTANCES

Admittedly the situation ensuing upon the death of Reporter Perry was unique. The court was confronted with the fact of conviction calling for the death penalty after a lengthy trial accorded Chessman. The alternatives of action at that time were most limited and became singular upon the refusal or failure of Chessman to move forward under Rule 36(b) of the Rules on Appeal as formulated by the Judicial Council by seeking application for permission to prepare a settled statement in place of the uncompleted transcript. The alternative was preparation of the trial transcript by the method selected since the possibility of a new trial did not exist. California Penal Code, § 1181 sets forth the exclusive grounds upon which the court may grant a new trial in a criminal case and the death of the court reporter and the attendant inability upon his part to prepare the trial transcript is not one of the enumerated statutory grounds.

As stated in *People v. Chessman*, 35 Cal. 2d 455, at 459, 460:

"* * * Furthermore, neither the death of a reporter nor impossibility of procuring a transcript is a ground for granting a new trial. Section 1181 of the Penal Code provides that 'When a verdict has been rendered against the defendant, the court may, upon his application, grant a new trial, *in the following cases only*:' [Italics added.] It enumerates seven grounds, none of which encompasses the situation depicted here."

If any attempt were made to grant Chessman a new trial, it would have been subject to attack upon the part of the prosecution by way of prohibition; it would have been subject to attack upon the part of Chessman himself by way of prohibition, and if conceivably the commencement of a second trial were reached, this defendant would be fully entitled to raise the plea of double jeopardy. Viewed against these considerations the employment of substitute Reporter Fraser became the exclusive and proper method for preparation of Reporter Perry's notes.

THE SETTLEMENT PROCEDURE HAS BEEN EXHAUSTIVELY EXAMINED BY FEDERAL AND STATE COURTS AND FOUND TO BE SUFFICIENT

The narrated manner in which the trial transcript was settled has heretofore been examined by state and federal courts. The Chessman record has been sifted through the screening judgments of many courts and in no case has relief been granted. Neither state nor federal judges have discovered material error in the transcript nor in its method of preparation. Whether Chessman's allegations of error have been founded upon lack of due process, equal protection or insufficiency of the evidence the courts have displayed a steady unity in refusing his claims.

A. Review of the State Court Decisions.

Commencing in May of 1950 is the parade of judicial review, and in *People v. Chessman*, 35 Cal. 2d 455, the California Supreme Court had squarely presented to it the lawfulness of the manner in which the trial record was prepared. The opinion furnishes a complete discussion of the method used, approves of it, and makes the cogent observation that it is essentially a question of fact as to whether or not one good shorthand reporter can read and transcribe with substantial accuracy the notes of another. In this Chessman decision the court measures the right of Chessman to be present upon settlement of the record by referring to his status as a convicted defendant, lawfully confined at San Quentin State Prison and goes on to state:

> "* * * He was not and is not entitled as a matter of right to go about the state making appearances before courts to present legal arguments. Neither reason, public policy, nor any express provision of law requires defendant's personal presence at proceedings to determine the accuracy of a transcript. From a time before his trial began defendant has repeatedly claimed, as he does now, that in connection with his representation of himself he is entitled to rights and should be accorded privileges greater than those of a defendant who is represented by counsel * * *" (35 Cal. 2d 455, at 467.)

This first Chessman decision is to our way of thinking a complete review of all of this litigant's various claims as alleged and re-alleged throughout the years, save certain claims which occurred to him near some of the end cases in this litigation.

In December of 1951 there followed *People v. Chessman*, 38 Cal. 2d 166, and again the court considered the sufficiency of the transcript and stated at page 172:

"* * * Reexamination of these arguments and of the transcript leaves us convinced that the transcript permits a fair consideration and disposition of the appeal."

This was the automatic appeal provided by California law in all death penalty cases (California Penal Code § 1239) and in which all of the judgments of conviction were affirmed. The United States Supreme Court denied certiorari (343 U.S. 915 [72 S.Ct. 650, 96 L.Ed. 1330]) and a petition for rehearing (343 U.S. 937 [72 S.Ct. 773, 96 L.Ed. 1344]).

In October, 1954, came *In re Chessman*, 43 Cal. 2d 391, wherein Chessman was before the court on a motion to vacate stay of execution of judgment imposing death penalty, and again the court denied relief based upon Chessman's attacks upon the transcript and rejected an allegation of fraud raised for the first time in July, 1954. In this Chessman decision Justice Schauer in reviewing Chessman's past and newly contrived claims stated at page 404:

"* * * This particular assertion as to the inadequacy or inaccuracy of the transcript is but a further item in the long-continued and reiterated attacks on the transcript which have been presented to, and resolved against defendant by, not only the superior court and this court but also by the United States District Court, the United States Court of Appeals, and the Supreme Court of the United States. If this assertion was to be urged it should have been presented to the superior court in 1949 and to this court upon the motion in respect to the transcript which was adjudicated in People v. Chessman (1950), supra, 35 Cal. 2d 455."

B. Chessman Decisions in the Federal Courts.

Because of the many Chessman decisions only those we deem most pertinent will be discussed; however, for a complete history of Chessman appeals and proceedings in

habeas corpus, reference is made to *In re Chessman*, 128 F.Supp. 600, and footnotes there set forth; *Chessman v. Teets*, 138 F.Supp. 761 at 763, and footnotes therein.

The United States Supreme Court has denied certiorari upon five occasions; granted certiorari in *Chessman v. Teets* (1955), No. 196 October Term, 1955, and remanded the cause to the United States District Court, Northern District of California, Southern Division, solely for consideration of the factual issue as to whether or not the trial transcript was corruptly or fraudulently prepared. The court did not direct specific inquiry into the element of due process attendant upon the failure of Chessman to be personally present upon the settling of the record. Judge Goodman in his opinion of January 31, 1956, *Chessman v. Teets*, reported in 138 F.Supp. 761, states at page 765:

> "There is not a scintilla of verity in the allegations made in the petition. The evidence not only does not disclose the existence of a single fact from which even an inference of fraud or impropriety may be drawn, but clearly and persuasively shows that the judge, the district attorney and the reporter diligently endeavored to the best of their ability and to the extent of their ingenuity to complete a fair and proper record and transcript for the use of the Supreme Court of California * * *"

In 1953 in *Chessman v. People*, 205 F.2d 128, the United States Court of Appeals, 9th Circuit, considered the applicability of the due process provisions of the Fourteenth Amendment to the Chessman matter and held at page 131:

> "There is no merit in the contention that the due process provisions of the Fourteenth Amendment were violated."

In its most recent opinion dealing with Chessman, *Chessman v. Teets*, United States Court of Appeals, 9th Circuit;

Case No. 15092, Oct. 18, 1956, the court squarely passed upon the question of due process holding:

> "That precise question, however, has heretofore been considered, and decided adversely to appellant, by both the California supreme court and this court.
>
> In holding against appellant on a similar contention, the California supreme court said:
>
> '* * * Neither reason, public policy, nor any express provision of law requires defendant's personal presence at proceedings to determine the accuracy of a transcript. * * * In the trial court he was repeatedly offered and refused counsel * * *. In these circumstances he cannot complain that he has been prejudiced by the fact that he has not, since his conviction, been allowed to appear personally in court.' People v. Chessman, 35 Cal. (2d) 455, 467, 218 P. (2d) 769, 776.
>
> When the identical question was before this Court in 1953, we held against Chessman, saying:
>
> 'There is no merit in the contention that the due process provisions of the Fourteenth Amendment were violated. The Constitution gives no right to appear in person or by counsel on a criminal appeal. Whether to grant an appeal, and the terms upon which it will be granted are purely matters of local law over which federal courts have no control.' [Citing and quoting Andrews v. Swartz, 156 U. S. 272, 274-275.] * * * And that there can be no denial of due process in the procedure used to settle the record on appeal, see Dowdell v. United States, 221 U.S. 325, 328-329, 31 S. Ct. 590, 55 L.Ed. 753.' Chessman v. People, 205 F. (2d) 128, 131.
>
> These decisions should not be construed as holding that the Fourteenth Amendment does not apply to settlement proceedings. It clearly does, as evidenced by

the fact that our later decision in the instant case was reversed on the ground that appellant's charge of fraud in connection with such proceedings invoked the Fourteenth Amendment. Similarly, had appellant charged fraud in connection with the argument to, or consideration by, the California supreme court, the Fourteenth Amendent would have been invoked.

But, although the Fourteenth Amendment stands in the way of fraud at any stage of litigation, it does not follow that it also guarantees the personal appearance of the defendant at every stage. That it does not afford such a guarantee in connection with settlement proceedings, is the proposition we were stating in the above quotation. The basic premise of this proposition is that the proceeding in which the transcript was certified was part of the appeal procedure, and not a part of the trial at which appellant's conviction was obtained.

We adhere to that basic premise. Due process does not require the personal presence of a prisoner, *even in a capital case*, for the consideration of his appeal. See Schwab v. Berggren, 143 U.S. 442, 36 L.Ed. 218, 12 S.Ct. 525.

It is true that in such settlement proceedings there are questions of fact to be determined. However, they are questions having to do with the settling and certification of the transcript for purposes of appeal. They involve no inquiry into the guilt or innocence of the defendant. *Thus, while the substitute reporter testified at the settlement hearing, he did not appear as a witness for or against the accused.* A similar contention that due process required the presence of a defendant at the hearing where the record was amended and certified was specifically rejected in Dowdell v. United States, 221 U.S. 325, 55 L.Ed. 753, 31 S.Ct. 590." (Emphasis supplied.)

THE RECORD IS CLEAR THAT CHESSMAN REJECTED THE ASSISTANCE OF COUNSEL IN A CRIMINAL PROCEEDING WHERE POSSIBILITY OF CONVICTION EXISTED RESULTING IN HIS PECULIAR STATUS AS A FELON WITH CURTAILED RIGHTS

As set forth in the statement of facts the record is clear that Chessman was bent upon defending his own cause. This was his constitutional right, and California was bound to recognize it. As further illustration of the persistent refusal of Chessman to avail himself of the benefit of counsel at the trial is the proceeding which took place in the superior court in Los Angeles on April 29, 1948, in connection with a motion made on that date by the defendant.

Chessman appeared in the trial court before commencement of trial seeking to withdraw his plea. At the outset of the hearing on April 29th, Judge Fricke stated to him: "* * * if you will just keep in mind that when a man acts as his own attorney, *he does not have any greater rights than any attorney would have in trying a case.*" (Emphasis supplied.) (Rep. Tr. Vol. 1, p. 1) Chessman at that time asked the court to appoint three psychiatrists to examine him to determine his sanity and whether he was legally qualified to act in propria persona. We repeat what Chessman said at that time: "I wish to point out that it is my intention to act in propria persona at this time ~~and to~~ *continue to do so until such time as it is legally established that I am not qualified to do so,* and that I will not accept a court-appointed attorney." (Emphasis supplied.) (Rep. Tr. Vol. 1, p. 4) In other words here was Chessman advised by the court of the limitation he was placing upon himself with reference to his rights by acting as his own counsel, and being placed upon such notice, Chessman stated that he wished to continue to act as his own attorney until the question of his sanity might disqualify him in that regard.

So it was that throughout the trial Chessman was not represented by counsel, although the fact is that legal services were furnished him at all stages of trial by Deputy Public Defender Matthews. The extent of such legal services is reflected in the record for whatever they may be.

At this point before the commencement of the jury trial Chessman was on notice that he was about to indulge in a deadly contest with justice in which his liberty and possibly his life might be forfeited. He was on notice when he rejected counsel that conviction might ensue which would place him in that status of a felon, a person whose rights are far different from those not so disabled. Chessman was on notice at that time that it is not the law in California nor of any other jurisdiction to our knowledge that felons awaiting execution are permitted to make personal appearances in connection with proceedings after judgment. These considerations must be measured against his claim that he was entitled to be personally present upon the settlement proceedings. Chessman was not authorized to increase his rights under either federal or state constitutions by representing himself at the trial, suffering confinement upon conviction, and then urging that because he had refused an attorney in the first instance, he became entitled to fill that gap by again acting as his attorney in connection with settlement procedure. If conduct or other action can make out a waiver of the right to counsel, then conduct in the face of notice can also make out a forfeiture of the right to be present in later proceedings such as here. And certainly there is no doubt that the right to counsel can be waived (*Adams v. United States ex rel. McCann* (1942), 317 U.S. 269, 279 [63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435]; cf. *People v. Chesser* (1947), 29 Cal. 2d 815, 822 [178 P.2d 761]; *People v. Justice*, 125 Cal. App. 2d 572).

Any alleged denial of due process by virtue of the fact that petitioner was not present at the settlement of the record in the state court has been waived. Petitioner asserts that he was denied due process since he was not given the opportunity to defend against the disputed transcript in the state court. Petitioner's contention in the state court concerning representation of counsel at the settlement proceedings was not that he was not permitted to have counsel of his own choosing, or appointed counsel to represent him in these hearings, but simply that he should have been allowed to appear personally in the proceedings. To the extent that his present contention is different, he has waived the contention. Petitioner did participate to the extent that he prepared a long list of objections to the proposed record.

As the decision of *Chessman v. Teets*, 221 Fed. 2d 276, at 278, stated:

> "* * * Chessman also contends that he was denied effective representation of counsel. He initially had counsel whom he relieved on March 12, 1948, the day he entered his pleas of not guilty. Thereafter he litigated until the instant proceedings in propria persona, repeatedly refusing proffered counsel at his criminal trial and in subsequent proceedings. On one of the occasions when he refused proffered counsel he stated to the court: 'I think I am a good enough lawyer.' The court then asked him, 'You don't want to trust it to a lawyer?' Chessman responded: 'I don't want to do it.' Chessman finally agreed to allow an attorney to act merely as a legal adviser. *Nowhere in his application does he allege that he demanded counsel after his persistent refusals of such aid.* Chessman waived his right to counsel and is now precluded from urging denial of his constitutional right upon this ground." (Emphasis supplied.)

As pointed out, petitioner's contention has never been that he was deprived of counsel at proceedings to settle the

record, but his contention was that he was his own counsel and he must be allowed to be present. If his contention now is that he was deprived of the right to be represented by counsel at these hearings, he has waived the objection by failing to raise the objection on appeal in the state court. He may not use the writ of habeas corpus as a writ of error.

Furthermore, the California Supreme Court determined the question of petitioner's right to be present as follows:

> "Defendant urges that he should have been allowed to appear personally in the proceedings which resulted in the present reporter's transcript, and that he should now be allowed to appear personally before the trial judge in support of his position. Since the entry of the judgments of conviction defendant has been lawfully imprisoned awaiting determination of his appeal. He is presently lawfully confined in San Quentin. He was not and is not entitled as a matter of right to go about the state making appearances before Courts. * * *" *People v. Chessman*, 35 Cal. 2d 455, at 467.

The reporter's transcript contains thirty-five instances wherein petitioner personally stated that he had elected to represent himself as his own attorney. This is not the type of situation presented in *Powell v. Alabama* (1932), 287 U.S. 45. The dissimilarity between the defendant Chessman and the defendants in the *Powell* case is startling. Chessman presents a picture of intelligence and literacy, the latter having been demonstrated by his writings; and further, his past contacts with the law cast upon him a certain familiarity with its procedures. In *Chessman v. Teets*, 221 F.2d 276, at 277, Judge Denman says of Chessman:

> "The many proceedings before us show Chessman to be a person of extraordinary ability, with experience in criminal procedure since 1941 in four prior cases, three charging armed robbery, in which he was convicted, three by plea of guilty and another after trial.

His voluminous citations of cases supporting his various contentions are worthy of an experienced criminal practioner."

On the other hand, in the *Powell* case we have defendants described by the court in terms of ignorance and illiteracy, feeblemindedness, and the like, precluding an adequate personal defense without counsel. We think it fair to state that California did all within its power to bring home to Chessman an awareness of the consequences which might ensue to him by virtue of conducting his own defense.

The talents of Chessman defeat any contention that this man was not capable of waiving counsel under the circumstances of this case (*Johnson v. Zerbst* (1938), 304 U.S. 458; *Betts v. Brady* (1942), 316 U.S. 455, 464).

THE PROCEDURE USED BY THE CALIFORNIA COURT IN SETTLING THE TRIAL RECORD WAS ADEQUATE AND DID NOT DENY PETITIONER DUE PROCESS OF LAW

A state is not required under the due process clause to provide an appella e procedure for review of a criminal trial (See *Brown v. Allen*, 344 U.S. 443, at 486; *McKane v. Durston*, 153 U.S. 684, at 687).

However, such appellate procedures must not be discriminatory. See *Cochran v. Kansas* (1942), 316 U.S. 255 (prison officials prevented the filing of an appeal); *Dowd v. Cook*, 340 U.S. 206 (prison officials prevented the fiilng of an appeal); *Cole v. Arkansas*, 333 U.S. 196 (defendant's convictions were affirmed under a criminal statute for violation of which they had not been charged).

The procedure in California for the settlement of a record where a court reporter dies before transcribing his notes was set out in *People v. Chessman*, 35 Cal. 2d 455. This was and is the law of California. This procedure was reasonable, and in no way discriminatory as to Chessman.

Procedures for the determination of the record in similar cases has been approved by several State courts. See note, 19 A.L.R. 2d 1098. Also see *Dowdell v. United States*, 221 U.S. 325.

The procedure used in this particular case is not dissimilar to the common law procedure or the procedure followed by numerous states until very recently in the settlement of bills of exceptions.

The procedure used in the State court to determine the accuracy of the record included the appointment of one of the deceased reporter's former employees to transcribe the notes of the deceased reporter. This reporter was aided by the notes which had been taken by the judge during the trial. A copy was sent to Chessman. He submitted a written "Motion to Correct and Augment Record" in which he requested numerous changes. The trial judge heard the written objections to the record, he allowed some and disallowed others. The reporter certified the record as being full and complete to the best of his ability. The trial judge certified that "the objections made to the transcript herein have been heard and determined and the same is now corrected in accordance with such determination * * * and the same is now, therefore, approved by me * * *" (See *People v. Chessman*, 35 Cal. 2d. 455, at 459).

Likewise, Chessman submitted a long list of corrections to the California Supreme Court in the proceedings held before that court. Indeed, we have noted that Judge Goodman expressly found that there was no fraudulent or unlawful conduct in the preparation of the transcript on appeal by the deputy district attorney and no misrepresentation to the trial judge for the purpose of inducing the trial judge to settle the record. The district judge likewise found that there was no fraud or collusion between the deputy district

attorney, the substitute reporter, and the judge in the settlement of the record. The district court expressly found that Fraser, the substitute court reporter, was especially competent to transcribe Perry's notes and did so, with fairness and competence. Furthermore, the district court expressly found that Fraser and Leavy and the trial judge "endeavored to and did arrange for and completed the transcript in Chessman's case in the best of good faith and with diligence and fairness, so that a fair and correct record could be provided the Supreme Court of California upon Chessman's automatic appeal to that court." *Chessman v. Teets*, 138 F.Supp. 761, at 766.

As is pointed out by the Supreme Court of California in the decision of *People v. Chessman*, 35 Cal. 2d 455, at 462, 465, even if all of the inaccuracies and omissions claimed by Chessman were allowed, the result on appeal would nevertheless not have been affected.

Avery v. Alabama, 308 U.S. 444 (1940) presents a case resulting in a murder conviction following a trial of very short duration. The petitioner was presented by court appointed counsel who requested a continuance of the cause so as to better prepare the defense. The continuance was denied and after conviction of petitioner and after motion for a new trial, the Supreme Court refused to reverse the judgment upon the ground that no showing had been made that the granting of additional time would have occasioned a different or better defense. As stated by the Court at page 452: "That the examination and preparation of the case, in the time permitted by the trial judge, had been adequate for counsel to exhaust its every angle is illuminated by the absence of any indication, on the motion and hearing for new trial, that they could have done more had additional time been granted."

As we read the *Avery* case, it seems to impose upon a petitioner the requirement that he make a factual presentation that alleged lack of due process has resulted in a situation different in some manner to his defense or position than would have existed had this disability not been placed upon him. In other words, in the *Avery* case the burden was upon defense counsel to demonstrate that the granting of additional time would have permitted a different or a better defense.

Is it not then incumbent upon Chessman to have demonstrated in the past and to demonstrate to this Court that in some heretofore unexplained manner his personal appearance at the trial transcript settlement proceedings would have enabled him to do more than or other than that which he did? Is it not further incumbent upon Chessman to demonstrate to this Court that there were other objections not made by Chessman in writing which could have been made with material difference to the case upon appeal? Along these lines we again refer the attention of this Court to the statement found in the California decision that allowing all of Chessman's objections the results upon appeal would have been the same.

THE PROCEDURE USED FOR SETTLEMENT OF THE TRIAL TRANSCRIPT WAS NO PART OF THE TRIAL PROPER AND INHERENTLY AS A FACT OCCURRING AFTER TRIAL IS APPELLATE IN NATURE AND ACORDINGLY RIGHTS EXISTING UNDER DUE PROCESS ARE NOT TO BE MEASURED AS AGAINST TRIAL REQUIREMENTS

California has had other instances of proceedings following conviction as illustrated by *People v. Martin* (1947), 78 Cal. App. 2d 340; *People v. Russell* (1934), 139 Cal. App. 417. Admittedly, the cases are factually different from the instant case; but they are illustrative of the great differ-

ences existent between a trial proper and proceedings following trial. Both cases refused to permit personal appearances by imprisoned felons.

The *Russell* case is an instance of refusal to permit the prisoner to appear in court for purposes of urging a motion, which refusal was attacked as being in conflict with the constitutional right to appear and defend. The court states at page 419:

> "Assuming that the point is one which can be raised on this appeal, we are satisfied that it is without merit. Section 13 of article I of the Constitution gives a defendant the right to appear and defend in person and with counsel 'in criminal prosecutions.' This right to be present throughout a criminal trial has been recognized both at common law and by statute and the decisions relating to that right are in practical harmony. In general the rulings are that it is essential to a valid trial that he should be present, not only when arraigned, 'but at every subsequent stage of the trial.' (16 C. J., p. 813; 12 Cyc. p. 523.) There is some conflict in the decisions as to the necessity of defendant's presence on preliminary motions and motions for new trial or in arrest of judgment. (16 C. J., p. 816.) But we have found no conflict in the holdings that his presence is not necessary after entry of judgment at the hearing of an appeal or other review of the judgment. (12 Cyc., p. 526; 8 R. C. L., p. 91; Schwab v. Berggren, 143 U.S. 442, 448 [12 Sup. Ct. 525, 36 L.Ed. 218]; Dowdell v. United States, 221 U.S. 325, 331 [31 Sup. Ct. 590, 55 L.Ed. 753]; Hogan v. State, 42 Okl. Cr. 188 [275 Pac. 355, 357].)
>
> The reason for the ruling requiring defendant's presence is stated in Southerland v. State, 176 Ind. 493 [96 N.E. 583], to be, first, to enable the prosecution to identify him, and to punish him in case of conviction; and second, to secure him full facilities for defending himself as he is advised in the progress of the trial of the evidence against him. On the other hand, as said

in Schwab v. Berggren, supra, page 449, 'neither reason nor public policy require that he shall be personally present pending proceedings in an appellate court whose only function is to determine whether, in the transcript submitted to them, there appears any error of law to the prejudice of the accused.' * * *".

As a trial does not commence until the jury is called into the box to be examined as to qualifications, so also a trial concludes when the jury's verdicts are returned and they are discharged. As stated in *Berness v. State* (1955), 83 So. 2d 607 at 618:

> "In a criminal cause, the term 'trial' does not include the arraignment or other merely preparatory proceeding which may be taken prior to the time of the administering of the requisite oath to the jurors. Byers v. State, 105 Ala. 31, 16 So. 716, 717, supra; Hunnel v. State, 86 Ind. 431, 434; McCall v. United States, 1 Dak. 320, 46 N.W. 608, 611; United States v. Curtis, 25 Fed. Cas. pages 726, 727, No. 14,905; Commonwealth v. Soderquest, 183 Mass. 199, 66 N.E. 801, 802. The word 'trial' when used in connection with criminal proceedings means proceedings in open court, after pleadings are finished, down to and including rendition of the verdict. Rosebud County v. Flinn, 109 Mont. 537, 98 P. 2d 330, 333."

The California Supreme Court in *People v. McKamy* (1914), 168 Cal. 531, adopts substantially the same definition of "trial" in these words at page 535:

> "* * * In criminal cases, it embraces steps tending to and culminating in a judgment of conviction or acquittal. An appeal is no part of a trial. It is a means for remedying errors which have occurred at a precedent trial."

Looking to the settlement procedure and the authority from which it derived, we find this set forth in the Rules on Appeal as formulated by the Judicial Council at page v:

> "The RULES ON APPEAL, including the Rules on Original Proceedings in Reviewing Courts (to be cited as Rules on Appeal) *govern appeals* from superior courts and original proceedings in the Supreme Court or District Courts of Appeal." (Emphasis supplied.)

These rules were adopted pursuant to Section 1247k of the California Penal Code:

> "The Judicial Council shall have the power to prescribe by rules for the practice and procedure on appeal, and for the *time and manner* in which the records on such appeals shall be made up and filed, in all criminal cases in all courts of this State." (Emphasis supplied.)

To further demonstrate that Chessman's claimed rights are not concerned with the trial process but are concerned exclusively with an appellate proceeding, reference is made to Section 1239(b) of the California Penal Code:

> "When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel."

At the very moment of judgment the superior court was divested of jurisdiction save that it was acting as an agency of the Supreme Court in preparing the transcript (*Associated Lumber & Box. Co. v. Superior Court of Calaveras County* (1947), 79 Cal. App. 2d 577 [180 P.2d 389]; *Clemens v. Gregg*, 34 Cal. App. 272 [167 P. 299]; California Penal Code § 1246).

The settlement proceeding being no part of the trial proper, and Chessman having been already accorded a full and fair hearing with the inescapable fact of judgment rendered against him, his rights are not now to be measured against the high standard of trial requirements as opposed to appellate process requirements. There has been a complete hearing here and we are now concerned only with the

adequacy of review. California by statute precludes felony prosecution unless the defendant be personally present, but as the statute reads, it refers only to being "personally present at the trial;" (California Penal Code, § 1043). Here again, Chessman was proceeding as his own counsel facing the possibility of conviction and confinement upon clear notice by this statute that his personal presence was guaranteed by law only "at the trial." As to federal courts the Sixth Amendment confers upon the accused rights relating to proceedings in criminal prosecutions. There is no mention there made of the right to appearance at proceedings following judgment.

Chessman elected to proceed charged with notice and knowledge that the right to personal appearance was guaranteed by California statute only with reference to the trial. He was also charged with the knowledge of possibility which became a reality, to wit: The death of the reporter and therefore the choice given to proceed by a settled statement method or to refuse to act and to be subject to the procedure as ultimately adopted. Chessman was charged with knowledge of the fact that no new trial would be possible in the event the reporter of his trial had died (California Penal Code, § 1181). Chessman elected to proceed in the face of these provisions of law and because he misjudged his rights and possibly entertained some notion that his rights as a convicted and confined felon would be greater than other persons in the same class does not create a violation of due process.

Price v. Johnston, 334 U.S. 266 at 286 holds with reference to personal appearance on the part of a prisoner with reference to an appellate proceeding:

> "Oral argument on appeal is not an essential ingredient of due process and it may be circumscribed as to prisoners where reasonable necessity so dictates."

THERE WAS NO LACK OF DUE PROCESS UNDER THE CIRCUMSTANCES OF THIS CASE BY FAILURE OF CHESSMAN TO BE PRESENT AT THE HEARING IN CONNECTION WITH SETTLING THE TRIAL TRANSCRIPT

As the Court has stated in its order, the question of due process must be related to all of the facts of the present case. Due process is elusive when sought to be defined. Perhaps there are as many definitions as there are cases. A lengthy discussion of due process is found in *Twining v. State of New Jersey* (1908), 211 U.S. 78. The *Twining* case furnishes an elastic definition to the phrase, one suited to changing concepts, but yet one which furnishes as an aid the example of history. Along those lines the *Twining* case suggests at page 107; "One aid to the solution of the question is to inquire how the right was rated during the time when the meaning of due process was in a formative state and before it was incorporated in American constitutional law." For other definitions see *Rochin v. California*, 342 U.S. 165; Willoughby on the Constitution of the United States, Vol. 2, Chapter xci; Taylor, Due Process of Law, The Origin of Due Process set forth in the introduction; The Fourteenth Amendment by Brannan, Chapter xi; 25 A.L.R. 2d 1407.

STATE CRIMINAL PROCEDURE AND DUE PROCESS REQUIREMENTS

"The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. Ex parte Reggel, 114 U.S. 642; Iowa Central Railway v. Iowa, 160 U.S. 389; Chicago, Burlington & Quincy Railroad v. Chicago, 166 U.S. 226. 'The Fourteenth Amendment does not profess to secure to all persons in the

United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial jury, and on the other side no such right. Each State prescribes its modes of judicial proceeding.' Missouri v. Lewis, 101 U.S. 22, 31." (*Brown v. New Jersey* (1899), 175 U.S. 172, at 175.)

These cases are founded upon the proposition that in our federal system the administration of criminal justice is primarily committed to the care of the states (*Rochin v. California*, 342 U.S. 165; *Irvine v. California*, 347 U.S. 128). So far as the power of California to provide for the proceeding here utilized there can be no question. The only challenge, of course, lies to the question of the fairness of the procedure and the fairness of the procedure employed is to be measured against this language of the Supreme Court in *Ownbey v. Morgan*, 256 U.S. 94, at 110:

> "The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement, and with provision against every possible hardship that may befall."

THE LAW OF THE LAND HAS NOT HERETOFORE FOUND THE SETTLEMENT PROCEEDING TO BE LACKING IN DUE PROCESS

Definitions of due process inevitably wind their way toward the remote corners of English history; in fact to the time of the adopting of the Magna Carta.

> "* * * that the words 'due process of law' are equivalent in meaning to the words 'law of the land' contained in that chapter of Magna Carta, which provides that 'no freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful

judgement of his peers or by the law of the land.'" (*Twining v. New Jersey* (1908), 211 U.S. 78, at 100)

And in the United States the law of the land is, of course, the law as it exists throughout the union.

> "* * * This court has never attempted to define with precision the words "due process of law." * * * It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' Holden v. Hardy, 169 U.S. 366, 389. 'The same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' In re Kemmler, 136 U.S. 436, 448. 'The limit of the full control which the State has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.' West v. Louisiana, 194 U.S. 258, 263." (*Twining v. New Jersey* (1908), 211 U.S. 78, at 101 and 102)

Procedures highly similar to, if not identical with, that employed by California in the Chessman situation—although admittedly procedures not operating upon identical facts—have been approved by other state courts. This is the law of the land so far as these other jurisdictions are concerned (See Note 19, A.L.R. 2d 1098).

Under California law it has been held that Chessman did not have the right to make a personal appearance in connection with the settlement proceedings. Furthermore, we believe it to be the law of all of the other states that prisoners undergoing confinement and awaiting execution of the death penalty are deliberately restrained in their pub-

lic appearances if only for public safety. This is the law of the land.

THE DUE PROCESS REQUIREMENTS WITH REFERENCE TO THE PUBLIC SAFETY AND THE CONSTITUTIONAL REQUIREMENTS OF FAIRNESS

At the time of the settling of the trial transcript Chessman was undergoing confinement awaiting execution of the death penalty, and by nature of the charges found to be true against him was a danger to public safety. Consider this language in the dissenting opinion of Justice Jackson in *Price v. Johnston* (1947), 334 U.S. 266 at 301:

> "This is one of a line of cases by which there is being put into the hands of the convict population of the country new and unprecedented opportunities to re-try their cases, or to try the prosecuting attorney or their own counsel, and keep the Government and the courts litigating their cases until their sentences expire or one of their myriad claims strikes a responsive chord or the prisoners make the best of increased opportunities to escape. I think this Court, by inflating the great and beneficent writ of liberty beyond a sound basis, is bringing about its eventual depreciation."

And yet, all of the rights of the constitution were his except as properly limited by his status as a prisoner. Chessman, to begin with, aside from his application to the California Supreme Court seeking to compel his presence before Judge Fricke, did nothing further. We submit that if due process gave him a right to be present, it was his right and his duty to exercise it. Due process and those singular rights which are inherent in the concept are subject to waiver. (*Pierce Oil Corp. v. Phoenix Refining Co.* 259 U.S. 125; *Pierce v. Somerset Railway*, 171 U.S. 641; *Wall et al. v. Parrott Silver and Copper Co.*, 244 U.S. 407; *Tinsley v. Anderson*, 171 U.S. 101). See, also *Johnson v. Zerbst*, 304 U.S. 458, at

465, holding that right to counsel may be waived. The State of California gave to Chessman a complete copy of the trial transcript. It was read following which Chessman submitted his written list of objections and corrections. When we discuss personal appearance, we must realistically ask what more could Chessman do by way of personal appearance than that which he did by way of writing. A reading of the proceedings in connection with the settling of the transcript discloses that Chessman's written objections were considered; the voiced suggestions or objections of the prosecutor were considered and depending upon the objection, Chessman's contention was allowed or disallowed; it was not a proceeding in which witnesses were examined as to the original issues in dispute at the trial; it was not a proceeding in which personal appearance was required so that Chessman could represent himself to defend the truth of the charges against him; it was not a proceeding in which Chessman was entitled to be confronted by his accusers; it was not a trial for felony in which Chessman by statute had the right to be present at all stages of the trial. What occurred has already been described by Circuit Judge Haney in his opinion set forth in *Chessman v. Teets*, U.S. Court of Appeals, 9th Circuit, Case No. 15092, Oct. 18, 1956: "It is true that in such settlement proceedings there are questions of fact to be determined. However, there are questions having to do with the settling and certification of the transcript for purposes of appeal. They involve no inquiry into the guilt or innocence of the defendant. Thus, while the substitute reporter testified at the settlement hearing, he did not appear as a witness for or against the accused."

This proceeding was appellate in nature as we have pointed out, and for that reason due process requirements were more than met by giving to a prisoner all of the time requested to prepare objections with reference to the trial

transcript and then as the record before the California Supreme Court and before Judge Goodman shows, giving full consideration to each and every one of those objections.

We submit that it is difficult to state any disadvantage to Chessman, he having exercised his right to prepare written objections. And again, we bring home to the Court the observation by the California Supreme Court that even allowing all of the Chessman objections, they would have been immaterial to the result of the appeal.

In *Market Street Railway Co. v. Railroad Commission of California* (1945), 324 U.S. 548, at 562, the court states:

> "* * * But due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties."

This Court has previously found state action to be wanting in due process. Compare *Rochin v. California* (1952), 342 U.S. 165, morphine used as evidence obtained forcibly through use of stomach tube; *Irvine v. California*, 347 U.S. 128, evidence obtained in violation of constitutional rights; criticized but convictions affirmed; *Frank v. Mangum*, 237 U.S. 309, due process question in re allegation that the trial proceedings were influenced by violence and mob domination; *Powell v. Alabama* (1932), 287 U.S. 45, ignorant, illiterate defendants forced to trial without adequate services of counsel; *Tumey v. Ohio*, 273 U.S. 510, condemning judicial system which compensated trial judge from fines levied against defendants; *Moore v. Dempsey* (1923), 261 U.S. 86, trial dominated by threats of mob violence; *Thomas v. Texas*, 212 U.S. 278, discrimination based upon race; *Adams v. New York*, 192 U.S. 585, possession of policy slips prima facie evidence of intent, held not to violate due process; *Hurtado v. California*, 110 U.S. 516, discussing indictment

by grand jury and due process; *Garland v. Washington*, 232 U.S. 642, due process concerned with lack of arraignment under or plea to second information; *Brown v. Mississippi* (1936), 297 U.S. 278, confessions induced by physical torture; *Griffin v. Illinois*, 351 U.S. 12, refusal to furnish transcript based upon economic status as denial of due process; *Betts v. Brady*, 316 U.S. 455, refusal of state to appoint counsel upon request; *Gibbs v. Burke*, 337 U.S. 773, lack of counsel at trial.

These are the situations admittedly extreme, in which the court invokes its power of rebuke under the due process clause. How unlike those cases are the circumstances under which the trial transcript was settled here!

THE REQUIREMENTS OF AN APPEAL WITH REFERENCE TO DUE PROCESS

Neither California nor any other state finds lawful compulsion in the due process clause to furnish an appellate procedure for review of criminal cases. As stated in *McKane v. Durston* (1893), 153 U.S. 684, at 687:

> "• • • An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.
>
> It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper. In a large number of the States an appeal from a judgment of conviction operates as a stay of execution only upon conditions similar to those prescribed in the New York

> Code of Criminal Procedure; in others, a defendant, convicted of felony, is entitled of right to a stay pending an appeal by him. But, as already suggested, whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself."

See, also *Andrews v. Swartz* (1894), 156 U.S. 272, at 275; *Mallett v. North Carolina* (1901), 181 U.S. 589, at 598, 599.

It is for the state, then, having elected to provide an appellate procedure to insure that in application and practice it be uniform. It need not be ideal and it must be considered with reference to the circumstances which invoke it.

Chessman cannot point to a lack of equal protection in the proceedings affecting him. The proceedings in the first instance came about upon the death of the reporter Perry when Chessman refused to make application to submit the appeal upon a settled statement, and indeed sought to prohibit the appeal.

The due process element of the case and the failure of Chessman to be present at the hearing on settlement of the trial transcript must be viewed in the light of all of the circumstances of the case which have heretofore been referred to. Again, however, at the expense of repetition Chessman chose to represent himself and refused the services of counsel; Chessman refused to prepare a settled statement and sought a dismissal of the appeal; Chessman elected to defend his own cause charged with the knowledge of the operation of California statutes and Rules on Appeal; Chessman was in fact furnished the trial transcript and did in fact submit a 35-page list of corrections entitled: "Motion to Correct and Augment Record"; Chessman was afforded a complete review upon no less than three occasions by the State Supreme Court; a complete review by

federal courts, and a hearing which settled once and for all the fairness of the manner in which the trial transcript was prepared. Under the circumstances here outlined there can be no question but that any requirements of due process as they exist with reference to a convicted and confined felon have been met.

THE REPEATED DENIALS OF CERTIORARI ARE NOT WITHOUT MEANING

Although it has been stated that neither side can take comfort from such denials, nonetheless, Justice Jackson has this to say in *Brown v. Allen*, 344 U.S. 443 at pages 542 and 543:

> "* * * But, for the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of res judicata as applied either by state or federal courts."

See the opinion of the Court in *Brown v. Allen* at pages 456, 457.

The exhaustive treatment of both facts and law applicable to the Chessman matter and the denials of certiorari by this court are of persuasive influence and grounds for denial again.

The state determinations as re-affirmed upon federal review are entitled to great weight in this Court (*Brown v. Allen*, 344 U.S. 443 at 457).

CHESSMAN FAILED TO PRESENT TO THE STATE COURT THE ISSUE OF REPRESENTATION BY COUNSEL AND HAS WAIVED THE QUESTION

The question here for review, insofar as petitioner now asserts that he was entitled to be represented by counsel is

a new approach to the case. It is not a contention which was originally urged upon appeal in the California Supreme Court. In that proceeding Chessman's position was clearly stated, and we quote from his opening brief in *People v. Chessman*, Crim. No. 5006, reported in 35 Cal. 2d 455:

> "This, admittedly, is an effective technique for preventing an appellant from proving that a record is prejudicially inaccurate and incomplete, that it was completed by incompetent means, and that deceit and fraud were practiced in its prepartion. It is an effective technique, but is it a legally proper one?
>
> Certainly it cannot be denied that had an attorney been representing the appellant *the* the trial court would not and could not have excluded such attorney from making any showing the attorney had desired.
>
> Therefore, it follows that the appellant was excluded from appearing at this 'settlement' and resisting the settlement of the transcript simply because he was appearing in propria persona." (pp. 45-46)

In the petition for a writ of habeas corpus filed in the United States District Court, Northern District, Southern Division, No. 34373, signed by Caryl Chessman and verified on December 29, 1954, petitioner makes this allegation with reference to counsel at page 14:

> "* * * That to preserve and protect the rights guaranteed him in this respect your Petitioner was entitled to the effective representation of counsel at all stages of the proceedings; that your petitioner has been denied and deprived of the effective representation of counsel prior to and throughout the said trial, and in particular, your *petitioner was deprived of the right to be present* at the hearing of the settlement of the reporter's transcript on the said automatic appeal, * * *" (Emphasis supplied.)

If this language is alleging a violation of due process because Chessman was not represented by counsel, it was a contention never presented for consideration to the State court. If it is merely a repetition of the claim presented to the State court that he himself had the right to be present, then the ingredient now added that he was entitled to counsel is not properly before this Court for review. Before a question may be raised in this Court, it must have been presented in the court below so that that court might have an opportunity for consideration of it. It appears here that Chessman has adopted a new theory with reference to due process and the right to counsel which was not presented to the California Supreme Court nor to the federal courts (*Brown v. Allen*, 344 U.S. 443; *Porch v. Cagle* (1952), 199 F.2d 865, Court of Appeal 5th Georgia; *Woollomes v. Heinze* (1952), Circuit Court of Appeals, 9th Circuit, California, 198 F.2d 577, cert. den. 344 U.S. 929; Annotation: "Exhaustion of state remedy as condition for issuance by federal court of writ of habeas corpus for release of state prisoner, 97 L.Ed. 543; 28 U.S.C.A. 2254).

THE FOURTEENTH AMENDMENT DOES NOT GUARANTEE RIGHT TO COUNSEL IN EVERY CASE

In *Betts v. Brady*, 316 U.S. 455 at 464, this was the issue before the court: "The question we are now to decide is whether due process of law demands that in every criminal case, whatever the circumstances, a state must furnish counsel to an indigent defendant." The court points out that the Fourteenth Amendment does not incorporate the specific guarantees found in the Sixth Amendment, and confronted with a case in which the "accused was not helpless, but was a man 43 years old, of ordinary intelligence and ability of taking care of his own interests on the trial," it

affirmed the judgment of conviction. The Court states for a guide in determining whether error exists in deprivation of counsel:

> "* * * Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed." (*Betts v. Brady* (1942), 316 U.S. 455, at 462)

In *Gibbs v. Burke* (1949), 337 U.S. 773, wherein petitioner was tried, having made neither a request for counsel nor been offered the same by the court, the court held that under these circumstances petitioner did not have a fair trial as prescribed by the Fourteenth Amendment. But again as in the *Betts* case, stated at page 780:

> "* * * We consider this case on the theory upheld in Betts v. Brady, 316 U.S. 455, that the Constitution does not guarantee to every person charged with a serious crime in a state court the right to the assistance of counsel regardless of the circumstances. Betts v. Brady rejected the contention that the Fourteenth Amendment automatically afforded such protection. In so doing, however, it did not, of course, hold or intimate that counsel was never required in noncapital cases in state courts in order to satisfy the necessity for basic fairness which is formulated in that Amendment."

It is to be noted that both of these cases are concerned with trial proceedings, not with appellate procedure. Both cases are clear that the Sixth Amendment compels no action

upon the part of the states, and if we could read the facts of the Chessman situation into the language of these cases, we think it fair to conclude that where a judicially described capable and intelligent defendant refuses counsel, he is in no position to urge due process rights in proceedings after judgment.

THE QUESTION OF DUE PROCESS OF LAW IS NOT APPLICABLE TO THE FIRST 646 PAGES OF THE TRIAL TRANSCRIPT

Grace Petermichael had worked with Reporter Perry during his lifetime. She was his transcriber. Before his death Reporter Perry had dictated his notes of the trial proceedings pertaining to pages 1 to 646 of the reporter's transcript. Reporter Petermichael listened to the voice of deceased Reporter Perry and from the sounds communicated to her transcribed the words employed in Reporter Perry's voice as Perry had stated them from his notes.

This process of preparation would have occurred except for discontinuance of the relationship between reporters Petermichael and Perry, an unlikely event, whether or not Reporter Perry had lived or died, so that Chessman is in no position to challenge the method of preparation nor the accuracy of the first 646 pages. The great significance of the first 646 pages is found by considering the evidence with reference to counts 7 and 11. As reported in *People v. Chessman*, 38 Cal. 2d 166, 172, with reference to each offense:

> "* * * (7) Kidnaping Regina for the purpose of robbery, with infliction of bodily harm; punishment fixed at death * * *"
>
> "* * * (11) Kidnaping Mary for the purpose of robbery, with infliction of bodily harm; punishment fixed at death * * *"

Note that these are the counts, proof of which impelled the jury to impose the death penalty. Count 7 related to

Regina E. Johnson whose testimony lies within the first 646 pages of the transcript on pages 55 to 166. There is other testimony from Regina Johnson commencing at page 1516 and concluding at page 1522. The testimony of witness Johnson contained within the first 646 pages of the trial transcript prepared by Reporter Petermichael from Reporter Perry's dictation contains the identification of Chessman by the witness as the man who kidnaped her and who forced her to submit to acts of sexual degradation.

As to count 11, this is concerned with the witness Mary Alice Meza, again contained entirely within the first 646 pages of the transcript on pages 374 to 444, prepared by Reporter Petermichael from Reporter Perry's dictation and contains the identification of Chessman by the witness as the man who kidnaped her and who forced her to submit to acts of sexual degradation.

The foregoing must now be related to "Appellant's Closing Brief" prepared by Chessman and filed in the Supreme Court of the State of California on July 6, 1951, wherein at page 267 Chessman at that time in discussing count 7 (Regina Johnson's kidnaping and bodily harm count) said, "The facts as there set out at page 304 are not disputed by respondent as being correct * * * Not challenging the correctness of the facts, respondent concludes * * *". On page 268 of the same brief Chessman again discusses the Johnson kidnaping, and with reference to certain portions of the evidence states: "This is a correct statement of the evidence." Relating this language found at pages 267-268 of appellant's closing brief we turn now to page 303 of appellant's opening brief, volume two, where commencing at page 303 and continuing to page 304 we find an extensive quotation of the trial testimony taken from reporter's transcript page 67, lines 1-18, which states:

"The trial record divulges these facts—

The kidnaper orally commanded the victim, Regina Johnson, out of the car she was occupying back (a distance of twenty-two feet) to the car he was operating; she complied (Rep. Tr. 63, line 17, to 64, line 15).

While both kidnaper and victim were seated in the front seat of the kidnaper's vehicle, the kidnaper exposed his penis (Rep. Tr. 67, lines 12-14).

'Q. [By prosecutor] What next was done or said?

A. He made me use my mouth on his privates.

Q. Did you do that under compulsion, at the point of the gun?

A. That is right.

Q. By reason of threats he made in regard to you and Mr. Lea?

A. Yes.

Q. That he would kill you or you would be taken away in a casket?

A. That is right.

Q. Did the [kidnaper] expose his private parts to you, his penis?

A. That is right.

Q. Did he place his penis in your mouth?

A. He made me put my mouth over it.

Q. Was his penis in your mouth?

A. Yes.' (Rep. Tr. 67, lines 1-18)"

If Chessman in 1951 *was conceding the correctness of the testimony of Regina Johnson* which was the testimony connected to one of the death penalty counts, does not this concession take from him the right to urge the lack of due process founded upon an allegedly defective preparation procedure? If the record here is correct, what requirement then for an appearance by Chessman?

The attention of this Court is invited to Chessman's briefs submitted to the Supreme Court of the State of California upon the automatic appeal. Reading Volume One,

particularly with reference to counts 7 and 11, we find therein no attack upon the sufficiency of the evidence as to these counts. In Volume Two of appellant's opening brief is found a criticism of the verdict with reference to count 7, but only on the theory that the evidence did not make out bodily harm. Apparently it was not Chessman's contention that the evidence that was reported was incorrect, but merely that what he did, did not in law constitute bodily harm. Chessman also attacked count 7, but only contending that he did not kidnap for the purpose of robbery—again no head-on challenge to the sufficiency of the evidence.

A DISCUSSION OF THE RELIEF REQUESTED BY PETITIONER

Petitioner is asking by way of relief that this Court order a second hearing, identical to the recently concluded hearing conducted before Judge Goodman at which petitioner would be permitted to cross-examine witnesses produced by the state; to test the competency of the reporter; to produce witnesses and evidence in support of his claims that the shorthand reporter's notes were undecipherable; to prove Reporter Fraser's transcript is completely and grossly inaccurate. This plea plays a game with the Court. At the hearing before Judge Goodman at which petitioner was given the right to go into these very things, he actually produced nothing—not a single witness. In fact the State of California arranged for the presence of all of the witnesses to the proceeding; it paid for the travel and living expenses of Cecil J. Luskin, deputy clerk of the Superior Court of Los Angeles; Reporter Fraser; deputy district attorney Leavy; Judge Fricke; Paul Burdick, retired court reporter; Nana Bull and Mary Graves, jurors at the Chessman trial; the State of California brought Paul De Noia, deputy clerk of the California Supreme Court to the federal

court together with his records; and the State of California produced Chessman himself pursuant to Judge Goodman's previous order, and also produced George S. Jones, clerk of the Superior Court of Marin County. It is true certain of the witnesses present were called first by petitioner. Such was possible only because in the first instance the State in cooperation with the court and in order to have a full and complete hearing arranged for the presence of all of the witnesses referred to. Despite the fact that the Chessman hearing had been noticed for a great length of time, petitioner appeared in court that day with no witnesses, save those furnished by the state, with no depositions having previously been taken. What possible purpose could a second hearing serve in face of the demonstrated inability of Chessman to present anything beyond the wildest and most unsupported allegations.

We submit further that in appraising this relief the Court should bear in mind that it is being asked to do again what it did once for Chessman by referring the question of fraud in the preparation of the transcript to the District Court Judge. The relief requested that petitioner be discharged is, we submit, beyond the jurisdiction of this Court. The relief again requested in paragraph IX, subsection 2, that the state trial court shall conduct a new hearing is again merely asking the California Superior Court to do what Judge Goodman has already done.

The relief requested should also be appraised in light of the fact that Mary Alice Meza, principal witness with reference to count 11 which entailed the death penalty, has been and is presently confined at Camarillo State Hospital, Department of Mental Hygiene; illness has been diagnosed schizophrenia. Jarnigan Lea, another important witness at the Chessman trial was killed in an automobile accident some years ago. He was the escort of Regina Johnson who

was the kidnap victim of Chessman concerning count 7. An investigator, Arnold Hubka, has died of cancer, he having testified at the trial that he found in Chessman's possession a small nut which proved to have been taken from the spotlight of the stolen car Chessman used during his numerous offenses.

CONCLUSION

This litigant has been furnished hearings and reviews thus far without end. The hand of justice has been stayed time and again, if only to review questions already adjudicated or theories newly contrived. The lack of substance to Chessman's claims has been pronounced only after careful review, and on occasions the frivolity of his pleas has been condemned.

We submit that under the circumstances, no lack of due process appears, and strongly urge the Court to deny the relief requested.

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